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British Columbia

Report on

Settlement Offers

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON SETTLEMENT OFFERS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON SETTLEMENT OFFERS

The British Columbia Supreme Court Rules provide a number of mechanisms designed to facilitate the compromise of litigation. These include offers to settle and payments into court. In response to the pressure on the courts resulting from the number of disputes which proceed to trial, we have examined these mechanisms to determine whether they adequately encourage parties to negotiate rather than litigate their differences. Recommendations are made to enlarge the current scope of settlement offers so that they can be used more effectively by both plaintiff and defendant to encourage negotiation and resolution without trial of virtually any dispute that may arise. Recommendations are also made to resolve inconsistencies in the current law.

CHAPTER I INTRODUCTION

A. Settlement of Litigation

Justice is best served if it is speedy. Disputes between parties can often be settled without resort to litigation although it is frequently necessary to commence an action and pursue that course diligently either to encourage settlement or to bring the matter to early trial.

It is not surprising that the Supreme Court Rules provide procedures designed to encourage early settlements. Two of these procedures are the plaintiff's offer to settle and the defendant's payment into court. It is open to either party to make a serious offer respecting his estimate of the value of the litigation. If that offer is rejected and the result at trial vindicates it, the refusing party may become liable to the other party for the costs incurred following the offer or payment into court.

Currently, the pressure on the courts is immense. Litigants seeking a trial must often be content with a date a year or more away. The Chief Justice of the Supreme Court is exploring means of speeding up the administration of justice.

The crisis experienced by the courts in terms of the number of matters proceeding to trial and by litigants in terms of delay before a trial may take place suggests that it is appropriate to consider whether these procedures are adequately encouraging pre-trial settlements and whether they can be improved. Those are the questions we examine in this Report.

B. The Working Paper

This Report was preceded by Working Paper No. 45, "Settlement Offers." We received a number of responses to the Working Paper. All of our correspondents agreed that reform of the current settlement offer procedures was desirable and most endorsed the Commission's proposals. The responses will be referred to in greater detail later in this Report.

A. History

People who can't resolve their disputes litigate. The court is asked to determine the parties' rights and to provide a satisfactory remedy. Sometimes there is no doubt as to the outcome of litigation, but that is not always the case. Frequently the issues involved are difficult to resolve, so that in most cases the parties would be well advised to negotiate their differences and arrive at a reasonable compromise.

Settlement negotiations are generally not regarded as part of the process of litigation. They are conducted on a "without prejudice" basis, and the usual rule is that courts are never advised of without prejudice offers and counter-offers made before and during the trial. There are a number of reasons the courts are not given that information, primarily because a party should not be "prejudiced" by making an offer to settle that is for less than what he might expect to receive at trial.

Nevertheless, the law has long seen value in encouraging reasonable settlement negotiations. Two early forms of settlement offers recognized by the law are tender and tender of amends.

1. Tender

Tender is an offer of performance by a person under an obligation. For example, a person who owes another money, by offering to repay it in cash, tenders performance.His creditor may refuse the payment. If so, tender operates as a defence to an action by the creditor. If it was intended to rely on the defence of tender, the English Rules of Court required the defendant to pay that money into court. That is also required under the British Columbia Rules.[1] If the defendant succeeds on that defence, he may tax his costs, which are paid from the money in court.[2]

The practice of bringing money into court was first introduced in the reign of Charles II to "avoid the hazard and difficulty of pleading a tender."[3] Initially the defendant was allowed to bring money into court only in circumstances where a tender could be pleaded. Hence money could not be brought into court in an action for general or unliquidated damages whether based on tort, or contract.

2. Tender of Amends

While a formal tender was a good answer by the defendant to a claim brought in debt, this defence had no common law counterpart with respect to claims sounding in tort. Parliament intervened to modify the common law in respect of certain kinds of trespasses and thus created a new variety of defence known as a tender of amends. It is purely a creature of statute.[4] It involved an

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[1] R. 37 (6).

[2] R. 37 (12); if tender is alleged, and the plaintiff accepts the money paid into court, the defendant is still entitled to his taxed costs: R. 37 (13).

[3] The early history of this procedure is set out in *Tidd's Practice*, 9th ed. (1828) Chapter 25 at 619 ff.

[4] Halsbury (1st ed.) Vol. 27, 856 sets out some of the English statutes in force at the time of its publication, which provided a tender of amends defence: *see, e.g., Limitation Act*, 1623 (21 Jac. 1, c. 16), s. 5 (negligent or involuntary trespass); *Distress for Rent Act*, 1737 (11 Geo. 2, c. 19), s. 20 (lawful distress followed by unlawful act); *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 135 (trespass in execution of *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), or the special Act, or any Act incorporated therewith); *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c 20), s. 139 (trespass in execution of the *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20), or the special Act, or any Act incorporated therewith); and *see, generally, Public Authorities Protection Act*, 1893 (56 & 57 Vict. c. 61), s. 1. This defence must be specially pleaded. As to the effect of a tender of amends, *see Jones* v. *Gooday*, (1842) 9 M. & W. 736 152 E.R. 311; *Williams* v. *Price*, (1832), 3 B. & Ad. 695, 110 E.R. 254; Bullen and Leake, *Precedents of Pleadings*, (6th ed., 1905) at p. 919-20.

offer before litigation by the person who had committed the tort. If the "amends" were refused and litigation ensued, the offer could be pleaded as a defence. If the offer was vindicated at trial, it constituted a complete defence to the action and the defendant was entitled to his costs.[5]

One provision creating a tender of amends defence worth noting is section 5 of the *Limitation Act*, 1623.[6] It illustrates the antiquity of the concept. Moreover, an identical provision (section 7 of the *Statute of Limitations*) was in force in British Columbia until very recently.

In England, the defence remained confined to a relatively small number of trespass actions. Ontario has taken a different tack, making the defence of tender of amends available in any action sounding in tort.[7] British Columbia followed the English pattern. Tender of amends provisions appear in several statutes.[8]

An analogous concept, apology and retraction, is to be found in sections 6 to 8 of the *Libel and Slander Act*.[9] At least one case has used the expression "tender of amends" in connection with these provisions.[10]

The defence of tender of amends also appears in certain federal statutes.[11] The utility of the practice of requiring a defendant who pleads tender or tender of amends to pay the money into court militated heavily in favour of a similar practice for all claims that sounded in money. In effect, the current practice, which permits a defendant to pay money into court, functions like the defence of tender of amends in Ontario.[12]

B. The System of Litigation Costs[13]

Litigation is expensive. Usually the unsuccessful party will be obliged to pay the successful party's "costs" of the litigation. That consequence is intended to encourage parties to consider settling their differences. A person uncertain of the strength of his case might be less likely to take his chances in court if the result of losing is responsibility for the costs of the proceedings. Similarly, in procedures designed to encourage parties to resolve their disputes without litigation, the penalty exacted for failing to accept an adequate settlement offer usually centers on costs or their disallowance. Some understanding of the system of litigation costs in British Columbia, consequently, is useful background to the discussion of formal settlement offers.

A litigant represented by a lawyer will be charged for the legal services rendered in connection with the litigation. The costs incurred by the client are known as "solicitor and client" costs and have two component elements. First, there are *disbursements*, that is, money actually paid out by the lawyer to others, such as for transcripts of evidence, and fees to witnesses, con-

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[5] If the plaintiff received judgment for an amount greater than that paid into court, but the defence of tender was established, the plaintiff's costs were based on the difference between the judgment and the amount paid into court: *McLean v. Dove*, (1908) 13 B.C.R. 292 (Co. Ct.).

[6] *Supra*, n. 4.

[7] *See Judicature Act*, R.S.O. 1980, c. 223, s. 78.

[8] *Company Clauses Act*, R.S.B.C. 1979, c. 60, s. 172; *Expropriation Act*, R.S.B.C. 1979, c. 117, s. 118; *Rent Distress Act*, R.S.B.C. 1979, c. 362, s. 21; *School Act*, R.S.B.C., 1979, c. 375, s. 220(4).

[9] R.S.B.C. 1979, c. 234.

[10] *See Bennett v. Sun Publishing Co.*, (1972) 29 D.L.R. (3rd) 423 (B.C.S.C.).

[11] *Customs Act*, R.S.C. 1970, c. C-40, s. 147; *Excise Act*, R.S.C. 1970, c. E-12, s. 82; *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 67.

[12] The distinction between tender and R. 37 is that, if tender is alleged and money is paid into court, the defendant is not entitled to his costs unless tender is proved, even if the plaintiff's judgment is for an amount equal to or less than the amount paid into court: *Blair v. The Canadian Fishing Co.*, (1929) 41 B.C.R. 80 (Co. Ct.).

[13] To those who have read our *Report on Costs of Successful Unassisted Law Litigants* (LRC 20), we admit to having drawn freely on our earlier work in the preparation of this section.

sultants, court registries and so forth.[14] Second, there are *fees* for such services as consulting with the client, interviewing witnesses, preparing documents, preparation for trial, conduct of the case in court and other activities calling for the exercise of professional skill and judgment.[15]

The relationship between a lawyer and his own client with respect to payment of the lawyer's bill may be organized in two ways. Less commonly, no specific advance arrangement is made between the lawyer and his client, but from time to time during the course of the lawyer's handling of the client's affairs, or at the conclusion of those affairs, the lawyer will present the client with a bill of costs. This bill may be in one of two forms. In rare cases, it will consist of a detailed specification of disbursements made and services performed, with itemized charges in respect of each. More commonly, however, it will be in what is known as "lump sum" form. A lump sum bill contains "a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements." This procedure is sanctioned by the *Barristers and Solicitors Act*.[16]

Upon receipt of a bill, whether in itemized or lump sum form, the client will have two alternatives. He can pay the bill as presented, or he may have it taxed. Taxation is a process whereby a client may have his lawyer's bill reviewed by a court official with a view to determining whether, in all the circumstances, the charges made are reasonable and proper. If the taxing officer finds that the charges are excessive, he will reduce the amount payable by the client.

The second way in which the relationship between lawyer and client with respect to payment for the lawyer's services may be organized, is for them to make agreements as to the remuneration payable for the services, generally fixing an hourly rate designed to take account of the lawyer's costs and providing for a fair reward for his professional skill and experience. These agreements are made pursuant to another section of the *Barristers and Solicitors Act*, section 99 (1), which provides:

> Notwithstanding any law or usage to the contrary, a member of the [Law] society may contract, in writing, with a person as to the remuneration to be paid him for services rendered or to be rendered to the person in lieu of or in addition to the costs which are allowed to the member.

A lawyer's bill rendered pursuant to an agreement of this kind will not be exempt from review, though the process of review is somewhat different. Section 99 (2) of the *Barristers and Solicitors Act* empowers the client in these circumstances to apply to the Supreme Court, and

> If the court does not consider the contract fair and reasonable, it may either modify the contract or order the contract to be cancelled, and the costs, fees, charges and disbursements for the business done to be taxed in the same manner as if no contract had been made.

In fact, however, bills rendered by lawyers pursuant to contracts with their clients are rarely reviewed.

If a litigant is successful in the litigation, the court will normally, but not invariably, order that his unsuccessful adversary indemnify him for the costs that he has incurred. The principle upon which this order is based is compendiously stated in the Supreme Court Rules by the provision[17] that "the costs of and incidental to a proceeding shall follow the event unless the court other-

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[14] *Buckland* v. *Watts*, [1970] 1 Q.B. 27, 37 (C.A.).

[15] *Ibid.*

[16] R.S.B.C. 1979, c. 26, s. 90 (3).

[17] B.C. Supreme Court Rules, 1976, R. 57 (5).

wise orders." The "event" is success in the litigation.[18] The theory behind an order that costs shall follow the event is that the unsuccessful party is somehow at fault in commencing or defending proceedings which, having regard to the judgment, ought not to have been necessary, and to that extent must indemnify the successful party for the expense to which he has been put. The costs thus payable by the loser to the winner are known as "party and party" costs.

The terms "indemnify" and "indemnification" as used to describe the system of party and party costs of litigation are somewhat misleading and call for a brief explanation. They are used to indicate that party and party costs are payable by the losing side by way of *compensation*, not as a form of penalty. "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them."[19] The use of these terms indicates that the successful party may not recover from his adversary more than he has paid out.[20] It does not mean that he will recover all that he has paid out.

The probability is, in fact, that the winner will recover a good deal less than the amount he has paid out. To this extent, then, the word "indemnity" is quite misleading. The indemnity is at best a partial one. A report on the Supreme Court Rules published over 10 years ago,[21] for example, analyzes a hypothetical case in which the plaintiff claimed and recovered $5,000 after a two day trial. It is suggested in that report that the client would have to pay his lawyer $1,800 and would recover from his adversary approximately $750.[22] It is likely that today there is a significantly greater disparity between actual costs and the amount payable by the losing party.

There are two reasons for this disparity. First, and most important, a review of the extent of the loser's liability to indemnify the winner is accomplished through the process of taxation, already referred to, in accordance with a tariff set out as Appendix B to the Rules of Court. As Mr. Justice Clement pointed out in his dissenting judgment in *Paskivski* v. *Canadian Pacific Ltd.*[23] the tariff "arbitrarily establishes the amount of indemnity that may be recovered in respect of specified items . . . without attempting to determine the amount of real or full indemnity." Second, the loser is required to compensate only for those costs "necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them."[24] So, the Rules of the Supreme Court provide that:[25]

> The Registrar shall consider in the taxation of costs whether the work for which costs are claimed was necessary or proper, and if he is of the opinion that any part of the costs have been unnecessarily or improperly incurred, he shall disallow it.

Rule 57 (4) provides as follows:

> On a taxation, the Registrar shall allow necessary or proper disbursements and expenses but, except as against the party who incurred them, disbursements or

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[18] "The event is the whole outcome and result of the proceedings," *per* Buckley L.J. in *Howell* v. *Dering*, (1915) 84 L.J.K.B. 198, 203 (C.A.). There may be more than one "event" in a case, but that is a refinement that need not concern us here.

[19] *Harold* v. *Smith*, (1860) 5 H. & N. 381, 385, 157 E.R. 1229, 1231. And *see Ryan* v. *McGregor*, [1926] 1 D.L.R. 476 (Ont. C.A.).

[20] *See Formea Chemicals Ltd.* v. *Polymer Corp.*, [1967] 2 O.R. 424. But "costs" refers to the total of "fees" and "disbursements," so that the indemnity applies to the costs as a whole, and not to the two components making up the total. *Ibid.*

[21] Bouck & Roberts, *A Proposal for the Reform of the British Columbia Supreme Court Rules, 1961*, (1972).

[22] *Ibid.*, at 56-60.

[23] [1974] 1 W.W.R. 13, 18 (Alta. S.C.-A.D.).

[24] *Per* Malins, V.C. in *Smith* v. *Buller*, (1875) L.R. 19 Eq. 473, 475.

[25] B.C. Supreme Court Rules, 1976, R. 57 (3).

> expenses shall not be allowed which appear to the Registrar to have been incurred or increased through extravagance, negligence or mistake, or by payment of unjustified charges or expenses.

Almost invariably, then, there will be a difference between what the winning party must pay his lawyer, in the form of solicitor and client costs, and what he will recover from his adversary in the form of taxed party and party costs, and that difference will represent an out-of-pocket expense for the victor. In cases where the successful party is a plaintiff who has claimed damages, this will not be too serious a disparity since the damage award will ordinarily, though not necessarily, be large enough to cover the difference. Where the successful party is either a plaintiff claiming non-monetary relief, however, or a defendant, the matter may be more serious.

It is important that the purpose and effect of the tariff be fully understood. It has been said that:[26]

> . . . a system of litigation costs should strike a fair balance between the two concerns or interests of awarding indemnity to a successful litigant, and, on the other hand, keeping costs at a level that permits the average litigant to prosecute a claim.

The tariff seeks to do this—to provide some compensation to the winner without exposing the loser to an unlimited liability. It seeks to do so by specifying the costs which may be recovered and the rate of recovery, subject to certain over-all maximum figures for different kinds of cases. The effect is lucidly explained by Mr. Justice Clement in the *Paskivski* case, mentioned above. The question there was whether the fact that the successful party was a company which was throughout represented by a salaried solicitor, in its employ, affected the amount of costs it could recover. The majority of the Court held that no award of costs could be made for his service. Mr. Justice Clement dissented, saying[27]

> . . . costs are taxed on a block tariff. In my view of the matter a block tariff affords only a partial indemnity to the litigant. Solicitor-client costs will usually exceed, and in cases of difficulty may greatly exceed, the costs recoverable under a block tariff. In addition to that, the litigant himself and his employees may well have spent a good deal of time on the case at the expense of his business interests, quite aside from attendances on discoveries and at trial for which the block tariff makes some provision. Such a tariff does not contemplate an inquiry into all the costs of a litigant in order to provide a full indemnity; it provides a recognition that costs are involved and arbitrarily establishes the amount of indemnity that may be recovered in respect of specified items. I am of opinion that a block tariff recognizes the principle of indemnity without discrimination as between persons and corporations, or as between corporations who engage solicitors and counsel, and those who have them on their staff. There can be no doubt that litigation costs the litigant money either way, and the block tariff measures the indemnity that may be recovered from the losing side, without attempting to determine the amount of a real or full indemnity. I think we should recognize these principles. This leads me to differ from Stuart J. [*Stephens v. Calgary* (1909), 2 Alta. L.R. 331, 12 W.L.R. 379] in giving the party against whom the taxation proceeds an opportunity to show that the tariff provides more than indemnity. As he points out, it would be impossible to show this in the ordinary case if there is taken into account all of the time and overhead and other matters that would be involved . . . [The tariff] as it stands is far from an adequate measure of indemnity to the litigant from any point of view, and I do not think that a corporation should be deprived of its allowances merely because it has a solicitor or counsel in full-time service . . .

Many have expressed severe reservations about both the principle and the mechanics of the so-called "indemnity" system of cost allocation as between

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[26] *Supra*, n. 21, at 28-29.

[27] *Supra*, n. 23.

party and party and have urged that alternatives be considered.[28] Such a consideration would take us far beyond the terms of reference of this Report, however, and we wish to make it clear that we are concerned here with a limited problem only, and that the continued operation of the "indemnity" principle is assumed throughout. We should mention, however, that several of our correspondents were deeply concerned with the issue of costs and urged that the tariff of party and party costs be updated.

C. Offers to Settle

1. Rules 57 (13) and (18)

Under the former Supreme Court Rules, there was no real inducement for a plaintiff to make an offer to settle. If he pursued the matter through trial and was successful, he received an order of costs with his judgment. Consequently, a plaintiff would only compromise his claim if he were uncertain of the outcome, and in those cases the defendant might often wish to risk taking the matter to trial.

The current Rules provide that a plaintiff may make a formal offer to settle. Rule 57 (13) (a) provides:

> **Offer to Settle by Plaintiff**
>
> (13) (a) In an action for damages, the plaintiff, at any time before the commencement of the trial, may deliver an offer to settle in Form 61, specifying the claim or part of the claim in respect of which the offer is made and specifying a sum that the plaintiff is willing to accept in satisfaction of it.

The offer may only be for a "sum" in "an action for damages." If, for example, the plaintiff's claim is for debt, he would not be able to make an offer to settle.

The Rules also provide an inducement for the defendant to consider seriously a plaintiff's formal offer to settle. If the defendant refuses the offer and, at trial, the plaintiff is awarded an amount equal to or greater than that for which he offered to settle, the court may award the plaintiff up to double his costs for preparation, trial and proceedings after trial:

> **Effect of Offer**
>
> (18) Where a defendant fails to pay into Court or to file and deliver a consent to judgment pursuant to this rule and the plaintiff proceeds and recovers an amount equal to or greater than the amount specified in an offer to settle delivered by him, the court may award up to double costs to the plaintiff for the tariff items covering preparation for trial, trial and proceedings after trial other than appeal, as set out in Appendix B, exclusive of disbursements and expenses.

The effect of these two rules is said to be as follows:[29]

> The purpose of a plaintiff's offer to settle is to encourage realistic settlements and discourage frivolous defences. Of course a defendant has every right to have his defence considered, but now he may face the additional penalty of double costs if it is found wanting.

Throughout this Report, we will provide examples to demonstrate how the practices under discussion work. The following is an example of the plaintiff's offer to settle in its simplest form.

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[28] *See, e.g.*, Bouck & Roberts *supra*, n. 21, at 59-62.

[29] *Hope Hardware and Building Supply Co.* v. *Fields Stores Limited; Sears (Chilliwack) Ltd.*; *Ellis and Ellis* v. *Fields Stores Limited*, (1978) 7 B.C.L.R. 321 at 327 (B.C.S.C.) *per* Bouck J., aff'd on the issue of double costs, (1980) 137 D.L.R. 58 (B.C.C.A.).

Example 1: P commences an action against D for damages. P offers to settle pursuant to R. 57 (13) (a) for $100,000. D refuses the offer. P receives judgment for $100,000. P is entitled to up to double his taxed costs for preparation for trial, trial and proceedings after trial other than appeal. If P's judgment had been for $99,999 or less, he would not be entitled to increased costs.

"Double costs" means twice the amount taxable under normal circumstances.[30] As we mentioned, the term "costs" is frequently used to include fees and disbursements. However, "double costs" only applies to fees and not to disbursements. They are said not to be a penalty levied against the unsuccessful side, nor a bonus for the successful side,[31] but it is difficult to regard them otherwise. Notwithstandstanding the courts' discretion to order costs, if the plaintiff's offer is vindicated, double costs should ordinarily follow the event:[32]

> Before the enactment of R. 57, a plaintiff wishing to avoid the heavy costs of litigation (for which there was only marginal recovery even were the plaintiff successful) might make an offer to settle. In doing so he would risk sacrificing a larger figure that the court might award after trial but the costs of the litigation would be avoided. The double costs rule gives the plaintiff additional incentive to attempt a pre-trial settlement and an additional inducement to a defendant to treat pre-trial offers seriously. It seems to me, in fairness, that should the judgment of the plaintiff in making a pre-trial offer be vindicated, double costs should ordinarily follow the event. Unless this were the result the effectiveness of the rule would be eroded. I think I should be guided by these considerations in the present case.

That is so even if the judgment equals or only marginally exceeds the plaintiff's offer, a circumstance which might suggest that the defendant was justified in defending.[33] In *Nacht* v. *Broadway Driving School Ltd.*,[34] for example, Munroe J., on application, held that the matter of costs was clearly governed by the rules and did not require a court order to resolve.

Entitlement to increased costs further depends upon whether the plaintiff has given the defendant reasonable notice of the offer to settle and whether judgment at trial equals or exceeds the offer to settle. Even if the offer to settle is revoked, the court has discretion to grant increased costs up to the date of revocation.[35]

Fraser and Horn describe the tactical considerations of making an offer to settle as follows:[36]

> . . . [T]he costs potentially available to a plaintiff who has delivered an offer to settle in a sum less than the amount awarded to him at trial are limited to the tariff items covering preparation for trial, trial and proceedings after trial other than appeal (Rule 57 (18)) . . .
>
> Unless a very specific reason surfaces, it follows that a plaintiff has little to gain by delivering an offer to settle until just before the work of preparation for

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[30] *Upton* v. *Walker*, (1977) 3 B.C.L.R. 4 (B.C.S.C.).

[31] *Ibid. See also Smith* v. *Solonynko*, (Unreported B.C.S.C. decision) Vanc. Reg. No. 37877/75, Nov. 15, 1977 *per* Toy J.

[32] *Upton* v. *Walker*, *ibid.* at 5-6 *per* Meredith J.; *see also Russell* v. *Kostichuk*, [1979] B.C.D. Civ. 3596-01 *per* Legg J.; *Nacht* v. *Broadway Driving School Ltd.*, [1979] B.C.D. Civ. 3583-01 *per* Munroe J.

[33] *See, e.g., Upton* v. *Walker*, *ibid. Cf. Rawson* v. *Maher*, (1982) 15 Man. R. (2d) 6 (C.A.), where a successful offer did not attract costs because the party who refused a payment into court received an approximate amount in judgment, and was successful on contentious issues of law; *see also McCann* v. *B & M Renovating*, (1983) 34 C.P.C. 188 (Ont. S.C.), which involved a payment into court. Judgment was less than the payment in, but the trial judge held that the jury's award was inadequate and refused to award costs to the defendant.

[34] *Supra*, n. 32.

[35] *Griffith* v. *Martin*, [1983] B.C.D. Civ. *3576-02 (B.C.S.C.); see also Moreau* v. *Whidden*, (1982) 31 C.P.C. 150 (N.S.S.C.).

[36] *The Conduct of Civil Litigation in British Columbia*, Vol. I, at 411-12.

> trial begins . . . Where a defendant has paid into court in a case where the plaintiff's claim is fairly modest, the pressure on the plaintiff to settle is inversely powerful, because of the possibility that making a wrong decision will eat up the entire proceeds of judgment. In the offer to settle procedure, there is little incentive for the plaintiff with a small claim to deliver an offer to settle, because the cost impact will be slight.
>
> On the other hand, where the plaintiff's claim is serious and large, an award of double costs could be quite significant. Where the defence of a defendant is conducted by his insurer, there is also a troubling conflict of interest problem for the insurer where the offer to settle is at or close to policy limits and the possibility exists that judgment after trial could be significantly higher than those limits.

D. Defendant's Payment Into Court

1. Rule 37

The defendant's payment into court is the corollary procedure to a plaintiff's offer to settle and, therefore, possesses many similarities to it.

Rule 37 (1) provides as follows:

> **Payment into Court by Defendant**
>
> (1) At any time before the commencement of the trial a defendant may pay into court a sum of money in satisfaction of the whole or part of a claim for which the plaintiff sues.

Similarly, a third party to the action may pay money into court.[37] Payment into court is not an admission of liability.[38]

Under the former rules, money could be paid into court by one or more of several defendants sued jointly, upon giving notice to the other defendants.[39] Under the current rules, parties sued jointly may not make a payment into court except jointly.[40] The new rule was added to avoid complex issues that might arise respecting liability, contribution, indemnification and *res judicata*.[41]

If the payment is accepted in full satisfaction of all claims, the plaintiff may tax his costs up to seven days after delivery to him of notice of the payment into court.[42] The defendant may tax his costs incurred after seven days from delivery of the notice. If the plaintiff proceeds against the defendant and recovers an amount equal to or less than the amount paid into court, he is only entitled to costs incurred up to delivery of the notice to him.[43] The defendant is entitled to costs reasonably incurred after delivery of the notice.[44] If the notice was delivered less than seven days prior to the trial, entitlement to costs is in the discretion of the court. Rule 37 (17) provides as follows:

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[37] R. 37 (4). Except in a defamation action (R. 37 (15)), a party who is sued jointly with another may not pay money into court except jointly with that other party. The defendant must obtain leave of the court for removing money paid into court by a third party (R. 37 (9)), to prevent the defendant from making off with money to which the plaintiff may be entitled. An insurer who joins itself to an action as a "statutory third party" may make a payment into court in satisfaction of a plaintiff's claim: *Klinz* v. *Novus*, (1982) 40 B.C.L.R. 294 (B.C.S.C.).

[38] R. 37 (5); at common law, an unconditional tender was considered to be an admission of liability: *Dye* v. *Village of Elnora*, [1950] 2 W.W.R. 907 (Alta. S.C.); *Haines* v. *Can. Rv. Accident Ins. Co.*, (1911) 44 S.C.R. 386.

[39] O. 22 r. 4 (1).

[40] R. 37 (14). Although the payment is made jointly, the money is not regarded as the joint property of the defendants, nor is it available in its entirety to satisfy a plaintiff's judgment where the plaintiff is unsuccessful against one or more of the defendants: *see Imperial Salmon House Ltd.* v. *Krdzalic*, (1983) 37 C.P.C. 152 (B.C.S.C.).

[41] *See* Fraser and Horn, *The Conduct of Civil Litigation in British Columbia*, (Vol. I) at 397, n. 3; *see also* Teplitsky and Gomberg "Acceptance of Money Paid Into Court by One of Several Defendants: Lawyer Beware," (1978) 1 *Adv. Quarterly* 123.

[42] R. 37 (11). If a portion of the payment is expressed to be in satisfaction of costs, the plaintiff need not accept that part and may still tax his costs: *Clark* v. *Cook*, (1983) 33 C.P.C. 205; (B.C.S.C.); *cf. Friedrich* v. *Chisan*, (1983) 42 B.C.L.R. 396 (B.C.C.A.), where plaintiff accepted the whole of a payment into court, part of which the defendant stipulated was for costs.

[43] R. 37 (17).

[44] *Ibid. See Ellis* v. *Whitepass Transportation Ltd.*, (1983) 43 B.C.L.R. 103 (B.C.C.A.) on the effect of successive payments into court; *see also Higgings* v. *Radakovich*, [1983] B.C.D. Civ. 3583-04 (B.C.S.C.) on timeliness of a payment into court.

Plaintiff proceeding after payment in

(17) Where the plaintiff proceeds with an action and recovers an amount equal to or less than the amount paid into court,

(a) he may tax his costs reasonably incurred up to delivery to him of a copy of the notice under subrule (7) and, provided the notice was delivered at least 7 days prior to the commencement of the trial, the defendant may tax his costs reasonably incurred after delivery of the notice to the plaintiff; but if the notice was delivered less than 7 days prior to the commencement of the trial, the costs of any steps taken by the parties subsequent to delivery shall be in the discretion of the court, and

(b) the amount paid in shall be applied in satisfaction of the plaintiff's judgment after set-off of the defendant's costs, if any, and any balance shall be repaid to the defendant.

Example 2: P commences an action against D for damages. D pays into court, pursuant to R. 37 (1), the sum of $100,000. P does not accept it. P receives judgment for $100,000. D is entitled to his taxed costs arising after delivery of the notice of payment into court. If P's judgment had been for any amount greater than $100,000, D would not be entitled to costs. (In fact, he would be liable for P's costs.)

A defendant who refuses a payment into court by a third party and receives an amount less than that paid into court is entitled to costs reasonably incurred up to seven days after delivery of the notice. The third party is entitled to costs incurred after seven days from notice.[45] It is curious that the Rules respecting plaintiff and defendant, and defendant and third party, do not correspond more exactly. There would appear to be no reason why a defendant's entitlement to costs is triggered by a judgment equal to or less than the money paid into court, while a third party's entitlement to costs only arises if judgment for the defendant is less than the amount paid in. Similarly, there is no apparent reason why, if the plaintiff refuses the payment into court, costs are determined by the date of notice between plaintiff and defendant, but if the defendant refuses the third party's payment, costs are calculated from a date seven days from notice.

The policy supporting these rules is the same as that promoted by the plaintiff's offer to settle. Parties to litigation should be encouraged to negotiate reasonably and in good faith. If the defendant is prepared to make a reasonable offer, the plaintiff rejects it at his peril. Moreover, the law requires a person to mitigate his damages.One means of mitigation is to accept a reasonable offer and save the expenses of litigation.[46]

Fraser and Horn describe some of the tactical considerations in making a payment into court as follows:[47]

> The decision to make a payment into court may be affected by several considerations. The device is most effective against a plaintiff who is poor (because immediate settlement at a low figure may be an economic necessity; and because the potential penalty in costs is not a risk he can afford to take) or against a plaintiff whose claim is inflated (no settlement is likely but the benefit in costs to the defendant who successfully pays in may be substantial).
>
> If the case is one in which all the facts may be determined with reasonable precision at an early stage, it will be to the defendant's advantage to attempt to make that determination as soon as possible, in order to make an early payment into court, so as to obtain the maximum advantage in costs. Some kinds of claims, most typically personal injury claims, are difficult to assess until shortly before

[45] R. 37 (19).

[46] *Milosevic* v. *Sterling Shipyards*, [1980] B.C.D. Civ. 3579-03 *per* Trainor J.

[47] *Supra*, n. 36, at 405.

trial and are, therefore, more appropriate for payments into court shortly before the commencement of trial.

Attempting to predict the amount of a judgment is a notoriously insubstantial exercise. The defendant considering a payment in must weigh, on the one side, the benefit to him in costs that may result, plus the saving in legal fees which will result if the payment is accepted, against, on the other side, the prospect that the plaintiff is being offered too much. Prudence dictates that a payment into court should be at or toward the low end of the estimate of the range of amounts between which it is thought the verdict will fall. A further factor encouraging parsimonious payments into court is the widespread reluctance of persons having claims as plaintiffs to submit themselves and their witnesses to the ordeal of a trial.

E. Current Law

1. Reasonable Notice

(a) Plaintiff's Offer to Settle

What constitutes reasonable notice of an offer to settle depends on the circumstances of the case.[48] The defendant must have sufficient opportunity to consider the offer with a view to accepting or rejecting it.[49] Consequently, the court will consider, among other factors, how much notice the defendant had, the complexity of the litigation and the magnitude of damages involved.[50]

In *Jager* v. *Burnett*,[51] the offer was made one hour before trial. In *Abell* v. *Greater Nanaimo Water District*,[52] the offer was made the morning of the trial and was open until the trial commenced at 2:00 p.m. that day. In neither case was the notice adequate.[53]

Inadequate notice does not necessarily disentitle a plaintiff to increased costs. The court has a discretion to award *up to* double costs for preparation for trial, trial and proceedings after trial other than appeal. Consequently, even if notice was unreasonable in the circumstances, the plaintiff may still receive costs for a portion of the trial at a higher level. In *Hope Hardware*,[54] for example, following verbal notice, the plaintiffs made an offer to settle delivered on a Friday after 4:00 p.m.[55] The trial began the following Monday. Bouck J. said that had the plaintiffs' notice been delivered a week earlier he would have had no hesitation in awarding double costs. If the notice had been delivered on the Friday before 4:00 p.m. he might have awarded double costs for the last four days of the five day trial. In the circumstances, he awarded double costs for the last three days of the trial, and for items in the tariff that apply following the trial.[56]

From the cases, it would appear that if notice is inadequate in the circumstances, costs of preparation will seldom be awarded at a higher level.[57] That follows from the fact that preparation for trial will usually have

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[48] *See, e.g., Hope Hardware, supra*, n. 29; *Jager* v. *Burnett* (Unreported B.C.S.C. decision) Vanc. Reg. No. 43398/73, Je. 10, 1977, Legg J.; *Haynes* v. *Fontaine*, (1980) 19 B.C.L.R. 51 (B.C.S.C.), McKenzie J.; *Thorpe* v. *Whitehead*, (Unreported B.C.S.C. decision) Vanc. Reg. No. 36085/74, Aug. 11, 1977, Verchere, J.

[49] *Ibid.*

[50] *Abell* v. *Greater Nanaimo Water District*, [1980] B.C.D. Civ. 3596-02 *per* Locke J.

[51] *Supra*, n. 48.

[52] *Supra*, n. 50.

[53] In *Abell*, *ibid.*, it does not appear that the fact that the offer was subject to a time limit was significant. The court based its decision solely on the issue of whether notice was reasonable in the circumstances.

[54] *Supra*, n. 29.

[55] Under Rule 3 (1) (b), delivery of a document after 4:00 in the afternoon is deemed to be effected on the next day that is not a holiday. Bouck J. held that that rule was not applicable to determining whether notice of the plaintiff's offer was reasonable in the circumstances.

[56] One of the circumstances considered by Bouck J. was that the defendants conducted the trial with a view to delaying the inevitable, and appeared to be unwilling to accept any reasonable settlement.

[57] *See, e.g., Hope Hardware, supra*, n. 29; *Thorpe* v. *Whitehead, supra*, n. 29; *Haynes* v. *Fontaine, supra*, n. 48, *per* McKenzie J.

been completed by the time a last minute offer is made. In *Borsje* v. *Venuti*,[58] double costs were awarded for trial preparation, but not for the trial itself. The reasons for judgment do not disclose why this approach was taken, except that Hutcheon J. observed that liability was not in issue. Moreover, the trial only took a half day to complete. Perhaps in those circumstances it was reasonable for the defendants to wish to have quantum determined by the court.

Even extremely short notice may entitle a plaintiff to higher costs. In *Hudson* v. *Pottage*,[59] the defendants had one day between notice and trial. The defendants' solicitor, however, had prior instructions to reject that sum if it was offered. Legg J. held that in those circumstances the defendant did not require further time to consider the offer.

A settlement offer, before formal acceptance, may be revoked orally.[60] It may not be accepted orally.

(b) Defendant's Payment Into Court

Unlike a plaintiff's offer to settle where the rules do not prescribe a notice period, the defendant's payment into court is to be made before seven days from trial. A payment into court may be made later than that, but in that case, the court must decide whether it was timely in the circumstances.[61] Principles apply similar to those which guide a court when determining whether a plaintiff's offer to settle was made with reasonable notice. The court must determine whether the plaintiff had a reasonable opportunity to consider accepting or rejecting the payment.

2. Proper Form of Offer or Payment Into Court

(a) Plaintiff's Offer to Settle

The plaintiff's offer must be for a specific sum in an action for damages. While the offer is limited to claims appropriate to a money offer, it is not available if, for example, the plaintiff's claim is for debt.

Neither may a claim for a permanent injunction be the subject of an offer to settle,[62] although its inclusion in the offer will not bar the plaintiff's application for increased costs with respect to the portion of the litigation devoted to the claim for damages. Similarly, a claim for a declaration of an equitable proprietary right may not be the subject of an offer to settle:[63]

> Formerly, the right of a defendant to pay into court under any type of claim was unique in that the plaintiff had no similar weapon to put the defendant in a dilemma as to whether or not he accepted an offer under peril of costs. The new offer to settle I interpret as being intended to put into the plaintiff's hand a right coextensive with that of a defendant: the right to offer money in settlement of a claim and put the defendant at peril as to costs.
>
> It should be noticed that the payment-in provisions of RR. 37 and 38 are not limited or tied to any particular cause of action, but there are some actions in which a defendant cannot protect himself against costs, e.g., a claim for specific performance, for an accounting, or a declaration of trust—to mention only a few. The payment-in-procedure is simply inappropriate to these types of claim. It is for

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[58] (1977) 2 B.C.L.R. 260 (B.C.S.C.) *per* Hutcheon J.

[59] (Unreported B.C.S.C. decision) Vanc. Reg. No. B760238, Je. 29, 1977 *per* Legg J.

[60] *Smith* v. *Acadia Hotels Ltd.*, [1983] 2 W.W.R. 237 (B.C.S.C.); *aff'd.* on appeal, (1983) 43 B.C.L.R. 202 (B.C.C.A.). A revoked offer or payment into court may affect entitlement to costs incurred while it was open to accept the offer or payment: *see Garner* v. *Cleggs*, (1983) 127 S.J. 347 (Eng. C.A.); *cf. Baxter* v. *Baxter*, (1982) 32 C.P.C. 204 (Ont. S.C.).

[61] R. 37 (17); *see, e.g., Milosevic, supra*, n. 46. If the plaintiff does not receive notice, the situation is the same as if no payment into court had been made: *Dominion Bridge Co.* v. *B.C. Power Comm.*, (1963) 45 W.W.R. 486 (B.C.S.C.); *Hurd* v. *A.J. Desjarlais*, [1982] B.C.D. Civ. 3583-01, *per* MacKinnon J.

[62] *Hatico Marine Services Ltd.* v. *B.C. Hydro and Power Authority*, (1978) 8 B.C.L.R. 307 (B.C.S.C.) *per* Gould J.

[63] *Demitri* v. *Niemann*, (1981) 28 B.C.L.R. 74, at 77 (B.C.S.C.) *per* Locke J.; but *see Fougere* v. *Gillespie*, [1982] B.C.D. Civ. 3596-01, *per* Gould J. where *Demitri* was distinguished on the ground that these damages were not pleaded in the alternative.

this reason that the new procedure giving the plaintiff a coextensive right must, in my view, be limited to claims appropriate to a money offer: or, as the rule makers have put it in R. 57 (13) (a) "in an action for damages".

In the case at bar the plaintiff's claims are, with one exception, all equitable, e.g., the claim for a declaration of a half interest in the property and that it be held in trust. This type of claim cannot literally be satisfied by an offer to settle for money. The formal procedure to claim double costs as authorized by the rules is, to repeat, simply not appropriate. That does not say that the defendant could not accept it if he chooses, and consent to the dismissal of the action, but only that no claim can be made for double costs under the rules.

As to breach of promise, the plaintiff could have made an offer to settle to meet the claim for damages for breach of promise. However, she did not do so, as she did not specify the exact claim in respect of which the payment was made. The defendant had no means of knowing to what claim the offer was directed. For this reason, the plaintiff should not be entitled to double costs on that issue.

This limitation on the plaintiff's offer to settle may be responsible for forcing disputes to trial that could otherwise be settled. Problems would arise, however, if the plaintiff were permitted to make an offer to settle with respect to a claim for non-monetary relief. It would be difficult, for example, to determine whether the plaintiff's success at trial was equal to or greater than what had been offered. If the plaintiff's offer requires a temporary injunction, should judgment for a permanent injunction trigger entitlement to increased costs?

Even if the plaintiff's offer to settle sounds in money, it is insufficient unless it is for a fixed sum. In *Hine* v. *Bentley*,[64] for example, the plaintiff offered to settle for an amount that was subject to payment of interest at a fixed rate, from the date of notice to the date of payment. It was held that an amount that changes from day to day by the accrual of interest was not a "sum" within the meaning of Rule 57 (18). The "sum" in an offer to settle must be the same amount on the day of the offer by the plaintiff as on the day of payment into court or consent to judgment by the defendant.

The plaintiff's offer represents the amount he will accept in full satisfaction of his claim. Neither costs nor prejudgment interest are added on top of that sum. Presumably, however, there is nothing to stop a plaintiff from taking those into account when determining what amount he will accept.

(b) Defendant's Payment Into Court

A payment into court is limited to those claims appropriate to a money offer.[65] Consequently, claims for injunctions, specific performance or equitable proprietary rights cannot be the subject of a payment into court. Moreover, an impoverished defendant, by definition, cannot make a payment into court.

3. Entitlement to Increased Costs

The courts' discretion to award up to double costs, if the plaintiff makes an offer to settle, depends upon the plaintiff receiving judgment for an amount equal to or greater than the amount specified in the offer to settle. A defendant is entitled to costs if the judgment in favour of the plaintiff is less than or equal to the amount paid into court by the defendant.

If the plaintiff is successful, ordinarily he will receive judgment for his damages, prejudgment interest and costs. The award of costs is not considered when comparing the judgment to the amount specified in the offer to settle.[66]

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[64] (1979) 14 B.C.L.R. 10 (B.C.S.C.) *per* Esson J.

[65] *Demitri* v. *Niemann*, *supra*, n. 63.

[66] *See Davis* v. *Jensen*, (1955) 16 W.W.R. 388 (B.C.S.C.); *cf. Morgan* v. *Shaw*, (1926) 36 B.C.R. 454 (B.C.S.C.); *cf. Friedrich* v. *Chisan*, *supra*, n. 42.

Example 3: P commences an action against D for damages. P offers to settle pursuant to R. 57 (13) (a) for $100,000. D refuses the offer. P receives judgment for $95,000 plus $8,000 costs. The award for costs is not considered when comparing the amount of the judgment with the amount specified in the offer to settle. P is not entitled to increased costs.

There is some doubt whether prejudgment interest may be included in the judgment to determine entitlement to increased costs.

(a) Prejudgment Interest

The problem arises from the language used in Rule 57 (13) (a). The plaintiff's offer to settle must specify the "claim" in respect of which his offer is made. There is English authority that, since prejudgment interest is discretionary and need not be pleaded, it is not a separate cause of action.[67] Consequently, it should not be part of a defendant's payment into court, nor considered as part of the judgment when determining entitlement to costs.

This position was adopted by the British Columbia Court of Appeal in *Evans Products Ltd.* v. *Crest Warehousing Ltd. (No. 2)*,[68] with respect to a defendant's payment into court. In several previous decisions concerning Rule 57 (18), prejudgment interest had been taken into account.[69] Following *Crest Warehousing*, in a series of cases it was held that prejudgment interest should not be considered in determining whether or not a plaintiff recovered an amount equal to or greater than the amount specified in the offer to settle.[70]

Characterizing prejudgment interest as a benefit flowingfrom judgment, and not part of the plaintiff's claim, led to several anomalies. For example, a defendant who accepted a plaintiff's settlement offer by payment into court would not be liable to pay prejudgment interest. If, however, the defendant accepted the same offer by consenting to judgment, he would be liable to pay prejudgment interest.These results do not encourage early settlement:[71]

> Since the purpose of R. 57 is plainly to encourage settlement, it would be an obvious anomaly if its effectiveness varied so greatly according to whether or not the defendant had ready cash with which to demonstrate his acceptance of the settlement proposal made by a plaintiff in the period available for that purpose, that period often being quite short.

The results under Rule 37 were equally anomalous. If the defendant made a payment into court and the plaintiff accepted it, he would not be entitled to prejudgment interest. If he refused it and received judgment for the same amount at trial, entitlement to prejudgment interest might significantly outweigh the liability incurred in costs:[72]

> In such circumstances, a plaintiff would obviously prefer in many if not most cases to pay the penalty in costs involved in declining the payment-in and going on to trial; the cost penalty of refusing a reasonable damage settlement could be much more than offset by the benefit of obtaining interest on the damage award at eight, nine or ten per cent per annum over a period of several years.
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> . . . It is plain that only amendment of the rules or of the Prejudgment Interest Act can now restore the former clarity and effectiveness of these procedures designed to promote pre-trial settlement.

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[67] *Jefford* v. *Gee*, [1970] 2 Q.B. 130, [1970] 1 All E.R. 1202 (C.A.).

[68] (1978) 6 B.C.L.R. 177 (C.A.).

[69] *See, e.g., Upton* v. *Walker, supra*, n. 30; on R. 37, *see, e.g., Legros* v. *Evans*, (1977) 3 B.C.L.R. 395 (B.C.S.C.).

[70] *See, e.g., Veronneau* v. *Gregory (No. 2)*, (1979) 13 B.C.L.R. 42 (B.C.S.C.) *per* Taylor J.; *Husaluk* v. *Hudson Building Supplies Ltd.*, (Unreported B.C.S.C. decision) Vanc. Reg. No. C763754, Je. 29, 1978 *per* Verchere J.

[71] *Veronneau* v. *Gregory (No. 2)*, (1979) 13 B.C.L.R. 42, 44 (B.C.S.C.) *per* Taylor J.

[72] *Ibid.*,

This question was reconsidered by the British Columbia Court of Appeal in *Kellner* v. *Greig*.[73] They distinguished *Crest Warehousing* on the ground that in that case the payment in was equal to the judgment and triggered entitlement to costs. Whether prejudgment interest was to be taken into account was irrelevant in that case, and the court's observations were *obiter dicta*. The British Columbia Court of Appeal found that, while the court may exercise a discretion concerning the rate of interest, under the *Court Order Interest Act* a plaintiff was entitled to prejudgment interest. The court has no discretion to refuse to award such interest. Consequently, interest is a "claim" for which the plaintiff sues, and should be included in the judgment award to determine entitlement to costs.[74]

Kellner was decided with respect to Rule 37, defendant's payment into court. It has been subsequently held that the reasoning in the case applies equally to a plaintiff's offer to settle.[75]

> **Example 4:** P commences an action against D for damages. P offers to settle pursuant to R. 57 (13) (a) for the sum of $100,000. D does not accept it. P receives judgment for $90,000 plus $15,000 for prejudgment interest. Taking prejudgment interest into account, the amount of the judgment exceeds the amount P offered to accept in settlement. P would be entitled to up to double his taxed costs.

The *Court Order Interest Act*[76] provides an additional penalty if a party refuses a payment into court and an order for an amount equal to or less than that is made. Prejudgment interest may only be awarded to the date of payment into court. Ordinarily prejudgment interest is calculated from the date the cause of action arose to the date of the order. The defendant has been deprived of the use of the money from the date of payment into court. Consequently, it would be unjust to award prejudgment interest for the period following payment into court to the date of the order.[77]

(b) Payments on Account

An issue has arisen in a number of cases whether payments to the defendant before trial in respect of the litigation may be taken into account when valuing the amount paid into court. Usually this arises in automobile personal injury cases where the Insurance Corporation of British Columbia (I.C.B.C.) pays the defendant "no fault" benefits prior to trial. "No fault" benefits are not taken into account until after judgment, when they are deducted from the plaintiff's award.

In *Bekker* v. *Vassiliou*,[78] the plaintiff made an offer to settle for $20,000. I.C.B.C. paid into court $16,600 and alleged that no fault benefits already paid to the plaintiff should be taken into account. Those benefits would bring the amount notionally paid into court up to $20,000, in which case the

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[73] (1979) 15 B.C.L.R. 126.

[74] Characterizing prejudgment interest as a claim may mean that limitations of liability exclude prejudgment interest over the limit. In *Hubbell* v. *Dor*, (1981) 27 B.C.L.R. 242 (B.C.S.C.) *per* Gould J., for example, it was held that I.C.B.C.'s liability under s. 8.04 of the regulations to the *Insurance (Motor Vehicle) Act* was limited to $75,000 plus costs. No order for prejudgment interest on top of that amount could be ordered. In New Zealand, it has been held that a payment into court should take into account a plaintiff's claim for interest: *see Nauru Local Government Council* v. *New Zealand Seamen's Industrial Union of Workers*, [1982] 2 N.Z.L.R. 13 (H.C.).

[75] *Gem Structures Ltd.* v. *Orr*, (1983) 44 B.C.L.R. 18 (Co. Ct.).

[76] R.S.B.C. 1979, c. 76, s. 4.

[77] Curiously, if money is paid into court pursuant to a garnishing order, the plaintiff is entitled to prejudgment interest, notwithstanding that such funds do not attract the payment of interest: *Sehlstrom* v. *Pich*, (1983) 36 C.P.C. 79 (B.C.S.C.); *see also Williams* v. *Volta*, [1982] V.R. 739 (Full Ct. of S.C. of Vic.).

[78] (1979) 12 B.C.L.R. 305 (B.C.S.C.) *per* Callaghan J.

proceedings, except for the recovery of costs, should be stayed.[79] It was held that no fault benefits under the *Insurance (Motor Vehicle) Act*[80] should not be taken into account when determining the amount paid into court, since they are not taken into account until after judgment. Presumably, the plaintiff was willing to accept the amount specified in the offer to settle, in addition to no fault benefits. Similarly, in *Freund* v. *Locke*,[81] it appears that a plaintiff's offer to settle was considered to be exclusive of no fault benefits. In *Haynes* v. *Fontaine*,[82] however, it was held that a plaintiff's offer to settle was deemed to include no fault benefits received.

When determining whether success at trial was less than or equal to a defendant's payment into court, no fault benefits are taken into account by either adding them to the payment in, or deducting them from the judgment. In *Everett* v. *Raymond*,[83] the defendant paid in $83,000. The plaintiff also received $3,300 in no fault benefits. The judgment in favour of the plaintiff, including prejudgment interest, was for $84,685.52. Proudfoot J. held that the no fault benefits must be taken into account by adding them to the payment into court and awarded costs to the defendant:[84]

> There is no doubt that disclosure of the amount paid in benefits to a complainant (in this case the $3,300) would be taken into account in the ultimate assessment of damages. To me it follows then, that for the purposes of taxing costs pursuant to R. 37 (17) this payment, as well as the payment into court, forms part of the award. Section 24 (5) uses the wording "taken into account". I can attribute no other meaning to these words than just that. I find the defendants are entitled to take into account the $3,300 for a total payment of $86,300 for the purposes of dealing with costs under R. 37 (17).

These practices are inconsistent and add uncertainty to determining what is embraced in a settlement offer and whether the settlement offer has been vindicated by the result at trial.

4. Miscellaneous Aspects of Practice

(a) Varying Award of Costs

An award of costs at trial (or no award) does not affect the court's jurisdiction to order costs when informed of an offer to settle or of a payment into court.[84] That information does not come before the judge until his Reasons are handed down. The Rules must, therefore, contemplate a variation of the award when the fact of an offer (or payment into court) is disclosed.

(b) Amount Involved in the Action

Even if an offer to settle is not accepted, it may be considered as evidence of the amount in dispute, when calculating costs pursuant to the tariff. In *Allman* v. *Chlopan*,[86] the plaintiff's action was dismissed by consent. The plaintiff's offer to settle pursuant to Rule 57 (13) was evidence of the amount involved in the action for purposes of determining costs. The defendant had been required to prepare for trial on the basis that the claim against him

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[79] R. 57 (15).

[80] R.S.B.C. 1979, c. 204.

[81] (1980) 22 B.C.L.R. 158 (B.C.S.C.) *per* Hutcheon J.

[82] *Supra*, n. 48.

[83] (1980) 25 B.C.L.R. 328 (B.C.S.C.) *per* Proudfoot J.; *see also Baart* v. *Kumar*, (1983) 34 C.P.C. 272 (B.C.S.C.).

[84] *Ibid.* at 329.

[85] *Wardley Canada Ltd.* v. *Kam Enterprises Limited*, (Unreported B.C.S.C. decision) Vanc. Reg. No. C774003, Nov. 24, 1978, Meredith J.; under the former rules, it had been held that the motion to vary judgment as to costs should be made before entry of the formal judgment: *Bazley* v. *Langmann*, (1969) 67 W.W.R. 337, 3 D.L.R. (3d) 143 (B.C.S.C.).

[86] (1978) 9 B.C.L.R. 334 (B.C.S.C.) *per* Munroe J.; *c.f. Cominco Ltd.* v. *Westinghouse Canada Ltd.*, [1982] 1 W.W.R. 640 (B.C.S.C.). In England, a "without prejudice" offer may be made in which the offeror reserves the right to bring the offer before the judge on the issue of costs. Once the issue of liability is resolved, there is no reason in principle why such an offer cannot be revealed to the court: *see Cutts* v. *Head*, (1984) 128 S.J. 117; *see also Calderbank* v. *Calderbank*, [1976] Fam. 93, 106.

exceeded $30,000. The rule that "without prejudice" communications not be revealed to the court is to avoid improperly influencing the court's determination. That consideration does not arise in a taxation of costs.

(c) Contributory Negligence

Under the *Negligence Act*, liability for costs is determined by reference to the liability of the parties.[87] For example, if in an action for negligence it is found that the plaintiff was 20% responsible for his injuries, he will be entitled only to 80% of his costs.

An offer to settle or a payment into court which triggers entitlement to costs may alter the effect of the *Negligence Act*. In *Freund* v. *Locke*, mentioned earlier, no deduction for contributory negligence was made with respect to the order for costs:[88]

> The principle that I find in R. 57 (18) is that, if the defendant has rejected an offer of settlement which is equal to or greater than the amount recovered at trial, the defendant must accept increased responsibility for the trial which did take place by the payment of double costs.
>
> . . . I am of the view that this means the payment of double costs without apportionment, because they are costs of a trial which ought not to have taken place.

In *Northey* v. *Trueman*,[89] it was held that costs must follow the apportionment of liability for contributory negligence. In that case, however, Ruttan J. was considering whether the court's general discretion with respect to the award of costs[90] superseded the provisions under the *Negligence Act*. He concluded that it did not. More recently, the British Columbia Court of Appeal has held that the court's broad discretion under the *Supreme Court Act*[91] with respect to costs extends to allowing one party his full costs if the apportionment of liability under the *Negligence Act* will result in an injustice.[92]

In *Rae* v. *I.C.B.C.*,[93] the plaintiff, who had made an offer to settle which was rejected, received a higher amount at trial. The British Columbia Court of Appeal took contributory negligence into account as follows: the plaintiff taxed costs on the full amount of the award, under Rule 57(18). The defendant's taxed costs were then set off against the plaintiff's. Since the plaintiff taxed double costs, a portion of those costs relating to the contributory negligence remained after the set off.

(d) Interest on Funds in Court

Under the British Columbia Supreme Court Rules, interest is payable on "funds" paid into court, which are held for a period exceeding three months.[94] "Funds," as defined in Rule 58 (1), means any money paid into court except money paid,

(a) under the *Court Order Enforcement Act*,
(b) for security for costs,
(c) in satisfaction of a claim, or
(d) for bail.

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[87] R.S.B.C. 1979, c. 298, s. 3.

[88] *Supra*, n. 80, at 160.

[89] (Unreported B.C.S.C. decision) Vanc. Reg. No. 559/1975, Nov. 16, 1976, Ruttan J.; *see also Turner* v. *I.C.B.C.*, (1982) 137 D.L.R. (3d) 188, *per* Anderson L.J.S.C.; *Interpro Contractors Ltd.* v. *Ocean Falls Corp.*, [1982] B.C.D. Civ. 3572-02 (B.C.S.C.); *Roco Developments Ltd.* v. *Permasteel Engineering Ltd.*, [1983] B.C.D. Civ. 3576-07 (B.C.S.C.).

[90] R. 57 (5); *Supreme Court Act*, R.S.B.C. 197, c. 397, s. 63 (2).

[91] *Ibid.*

[92] *Peters* v. *Davidson*, (1982) 32 C.P.C. 210 (B.C.C.A.); *see also Agren* v. *Lee*, [1980] B.C.D. Civ. 3579-01 (B.C.S.C.); Hutcheon J. used discretion under s. 4 of Negligence Act to award costs in the full amount in respect of most of the litigation, notwithstanding plaintiff was 80% liable; *Griffith* v. *Martin*, [1983] B.C.D. Civ. 3576-02 (B.C.C.A.).

[93] [1983] B.C.D. Civ. 3577-01 (B.C.C.A.).

[94] R. 58 (5).

These exceptions are comprehensive, and it would appear that most money paid into court does not bear interest.

Money paid into court is deposited by the Registrar in a financial institution, and then remitted to the Minister of Finance.[95] The Minister is required to keep a separate treasury account, called "Investments, Supreme Court Act," for the deposit of these monies.[96] The funds are held in trust, and the balance of the "Investments, Supreme Court Act" account must at all times be substantially equal to the funds held by the Minister under Rule 58.[97] The Minister is empowered to invest the funds and convert securities paid into court into money.[98].

"Money" paid into court, which is not "funds" within the meaning of the rule and therefore not subject to interest, is also deposited by the Registrar in a financial institution.[99] All such monies on deposit for more than one year are paid to the Minister, and held like "funds" except as to payment of interest.[100]

If interest is payable on money in court, it is calculated at a rate 2 per cent below the prime lending rate of the banker to the Province of British Columbia.[100] That rate is determined September 30, December 31, March 31, and June 30 for each three month period following.[102] Interest is compounded June 30 and December 31 in each year.[103] Interest on money less than or equal to $100,000 is calculated from the first day of the month following payment into court. Interest on money in an amount greater than $100,000 is calculated from the date of payment into court.[104]

As mentioned earlier, monies paid into court in satisfaction of a claim are not "funds" within the meaning of the rule. Whether a payment is made to satisfy a claim is not so straightforward a question as it may appear to be. Two cases indicate problems of definition that have arisen.

In *Joshi* v. *Cooper Agencies Ltd.*,[105] the plaintiff improperly obtained a default judgment. The defendants paid money into court, partly because counsel agreed to the payment into court on the basis that the monies would earn interest at 8¾%. The Registrar informed the parties that interest was not payable on the money. Gansner L.J.S.C. held that the payment into court was not in satisfaction of a claim. The default judgment was improperly obtained. The payment was made with a view to avoiding any liability which might flow from failing to comply with the order. With respect, the distinction between "avoiding liability" for non-compliance and satisfaction of a claim is not obvious, unless counsel agreed to this course pending a challenge of the default judgment. The report is not clear on this point.

In *Nykwist* v. *Dow John Realty Ltd.*,[106] money was paid into court pending an appeal under the *Small Claims Act*. The money paid into court represented the judgment and costs of the appeal. The Registrar declined to pay interest on the money, finding that it represented "security for costs." Darling C.C.J. held that only a portion of the monies represented security for

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[95] R. 58 (2).
[96] R. 58 (6).
[97] R. 58 (6).
[98] R. 58 (7).
[99] R. 58 (9)
[100] R. 58 (9).
[101] R. 58 (5) (a).
[102] *Ibid.*
[103] *Ibid.*
[104] R. 58 (5) (6).
[105] (1978) 5 B.C.L.R. 388 (B.C.S.C.).
[106] [1980] B.C.D. Civ. 3669-01 (Co. Ct.).

costs. The balance, representing the judgment, were "funds" within the meaning of Rule 58 and interest was payable on them.

In each case, it would appear that money paid into court pending a challenge to a court order (in the first case to set aside the default judgment, in the second, an appeal) are not monies paid in satisfaction of a claim and are, therefore, funds, within the meaning of Rule 58.

Monies paid into court pursuant to Rule 37 represent "a sum of money in satisfaction of the whole or part of a claim for which the plaintiff sues."[107] A plaintiff's offer to settle specifies an amount "the plaintiff is willing to accept in satisfaction of [his claim]."[108] It would appear, therefore, that monies paid into court pursuant to Rule 37 or pursuant to an offer to settle under Rule 57 (13) (a) fall within the exception to Rule 58 and do not bear interest. In *Evans* v. *Jenkins*,[109] however, McTaggart L.J.S.C. held that monies paid into court pursuant to Rule 37 are "funds" with the meaning of Rule 58. He based his decision on two points. First, there is a distinction between monies paid into court and accepted, and monies paid into court in the hope that settlement will more likely result. Rule 58 contemplated the first situation. Rule 37 contemplated the second. Second, he held that the Rules were aimed at securing "just, speedy and inexpensive determination of every proceeding on its merits,"[110] and should be interpreted to promote that result. If money paid into court pursuant to Rule 37 did not bear interest, litigants would be less likely to adopt that practice. Consequently, monies paid into court are "funds" within the meaning of Rule 58 and bear interest.

The reasoning in *Evans* would not apply equally to a payment into court pursuant to a plaintiff's offer to settle. Such a payment into court would represent acceptance, and "satisfaction of a claim" within the meaning of Rule 58. Consequently, those monies would not be "funds." Interest would not be payable. There is also some doubt whether monies paid into court will continue to earn interest from the date the plaintiff accepts them in satisfaction of his claim. The reasoning of McTaggart L.J.S.C. would appear to suggest that, upon acceptance, the monies are no longer "funds" within the meaning of Rule 58. It should also be observed, however, that in these kinds of circumstances the party entitled to the money can apply to have it paid to him. Interest foregone should not represent a substantial amount of money.

Evans was reversed on appeal.[111] The British Columbia Court of Appeal concluded that monies paid into court pursuant to Rule 37 do not bear interest. A payment into court pursuant to Rule 37, whether accepted or not, was still paid in "satisfaction of a claim," and was not, therefore, "funds" within the meaning of Rule 58.

(e) Appendix B: Party and Party Costs

Rule 57 (18) provides that increased costs are calculated on costs set out in Appendix B. Appendix B provides the tariff of costs on a party and party basis. There are, however, two other bases upon which costs could be calculated: solicitor and client, and solicitor and own client. Party and party costs are set at a lower scale than solicitor and client costs. Solicitor and own client costs are calculated as the actual fees payable by the client to his solicitor. That measure of costs is awarded when the parties have by prior contract agreed to that scale. Solicitor and client costs are awarded when the

[107] R. 37 (1).
[108] R. 57 (13) (a).
[109] (1982) 36 B.C.L.R. 253 (B.C.S.C.).
[110] R. 1 (5).
[111] [1983] 4 W.W.R. 94, 43 B.C.L.R. 295 (B.C.C.A.).

unsuccessful party has conducted himself in a manner which deserves the sanction of increased costs. Solicitor and client costs serve as a kind of punishment to the unsuccessful litigant whose unnecessary and unwarranted conduct has increased the successful litigant's costs.

Appendix B places a maximum on costs that may be awarded. With respect to Rule 57 (18), it provides as follows:

	Maximum Costs
6. Where Rule 57 (18) applies—	
$3000 or under	$1000.00
Over $3000 but not exceeding $30000	1050.00
Plus $150 for each $1000 or part thereof by which amount involved exceeds $3000.	
7. Where the amount involved exceeds $30000 there is no maximum amount of taxable costs.	

It is open to question whether the maximum costs permitted under Tariff B are inclusive of all costs, or just those which may be incurred under Rule 57 (18) (preparation for trial, trial and proceedings after trial). The maximum costs permitted are exactly twice the maximum costs permitted if Rule 57 (18) does not apply. That would suggest that the maximum costs permitted are intended to be inclusive of all costs incurred in the litigation.[112]

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[112] *See, e.g., Gallen* v. *Butterley*, (1982) 42 B.C.L.R. 270 (B.C.S.C.).

CHAPTER III REFORM

A. Introduction

Our review of the current law governing offers to settle and payments into court indicates that on the whole these procedures work fairly well and serve to encourage parties to settle their disputes without resort to trial. We observed, however, that several aspects of the law were uncertain and that some were inconsistent. In this chapter, we examine approaches that might be taken to revising and refining the law.

The utility of offers to settle and payments into court is impaired by their confinement to liabilities that sound in money. An additional limitation on the defendant's payment into court is that the procedure cannot be used by an impecunious litigant. We think that some consideration should be given to whether the scope of these procedures can and should be broadened.

B. "Claims"

1. Offers to Settle

Currently, a plaintiff may make an offer to settle for a claim in money in an action for damages. If his action is for damages alone, the offer to settle works very well. If the plaintiff also asserts a claim in debt or seeks a declaration, injunction, order for specific performance or other non-monetary remedy, that portion of his claim cannot be the subject of an offer to settle.

The arguments in favour of offers to settle generally, apply with equal force to an expanded approach to the practice. It is desirable to encourage parties to litigation to negotiate in good faith. The possibility of increased costs, if a reasonable offer is refused, encourages a plaintiff to consider the merits of his case carefully and to make an offer to settle. That possibility also encourages a defendant to consider the merits of his case carefully and to consider seriously whether to accept an offer to settle.

In addition to the best interests of the administration of justice, it is often in the best interests of the parties to negotiate and settle their differences. The plaintiff's offer to settle benefits justice generally. Settlement relieves pressure on the courts. It also saves the parties legal costs and permits the plaintiff to obtain a remedy earlier than if the matter proceeded to trial.

In many cases, parties to litigation become emotionally caught up in the dispute. Principle (sometimes a euphemism for vengeance) becomes more important than reasonable compromise and one or more of the parties may be motivated by the simple desire to teach another party a lesson. In those cases, an offer to settle to which is attached a costs penalty may be effective in convincing the parties to forego "principle" and seek a fair settlement.

These are the merits of an offer to settle for a claim in damages. There are many other kinds of claims which do not sound in damages. Limiting offers to settle to damage claims restricts the ambit of a practice which has proven to be very valuable.

(a) Should a Plaintiff be able to Make an Offer to Settle for Debt?

Not all monetary claims may be the subject of an offer to settle. A plaintiff cannot make an offer to settle for a claim in debt. That limitation on a plaintiff's offer to settle was apparently intended to avoid penalizing defendants. Often a debt is not disputed. The defendant is merely unable to pay it.

In these circumstances, it may be unfair to permit the plaintiff to increase the defendant's liability for costs by making an offer to settle.

On the other hand, limiting offers to settle in this way permits defendants to delay. Buying time may be worth the costs of bringing or defending interlocutory procedures with a view to deferring a trial date and judgment. The prejudice to the plaintiff may be significant. Permitting the plaintiff to make an offer to settle for debt might make delaying tactics more costly, and hence less likely undertaken. In any event, in such circumstances, the plaintiff should at least be adequately indemnified for his costs.

We have concluded that the argument in favour of protecting defendants from increased costs where the dispute concerns a debt has been overstated. The defendant does not have to pay increased costs if he accepts a reasonable offer to settle by, for example, consenting to judgment. Nor is the prospect of immediate execution on the judgment too daunting. The defendant may apply for a stay of execution and an order for repayment by instalments.[1] Moreover, if the plaintiff proceeds to judgment by default, the costs involved will not be substantial in any event. Our conclusion is that it should be possible to make an offer to settle for a claim in debt.

When a plaintiff should be able to make an offer to settle is a related question. Currently, entitlement to increased costs extends only to preparation for trial, trial and proceedings after trial. That limitation has been imposed on offers to settle in order to prevent penalizing defendants by increasing their liability in costs in circumstances where it is likely the dispute only arose because the defendant is impoverished. We address this issue later in this Report.

(b) Should a Plaintiff be able to Make an Offer to Settle for Non-Monetary Relief?

Confining an offer to settle to monetary judgments considerably limits its scope. Any time a claim for damages is combined with a claim for other relief, an offer to settle may be ineffective to promote pre-trial settlement of the whole dispute. Whether or not a defendant pays into court money to satisfy the monetary portion of the claim, a trial will take place to resolve the other aspects of the parties' dispute. It is true that the proceedings are simplified. Nevertheless, a procedure which permits the plaintiff to make the whole of the relief sought with respect to his claim part of an offer to settle may remove the need for trial at all. That is a result we believe the law should encourage and the sanction of increased costs appears to be effective in encouraging parties to agree to reasonable compromises.

It is difficult to frame any argument in favour of limiting the scope of a plaintiff's offer to settle to monetary claims, beyond that the current approach to determining entitlement to increased costs is impracticable when applied to claims other than those which are in money. If the plaintiff seeks a declaration of equitable lien and the court makes a declaration of equitable charge, has the plaintiff's success been equal to or greater than the remedy he sought? Any attempt to compare the value of differing remedies in a quasi-mathematical manner is unlikely to be productive.

It is our conclusion that a plaintiff should be able to make an offer to settle for both monetary and non-monetary relief, provided an appropriate method can be developed for comparing the offer to the ultimate result in order to determine whether the costs sanction has been triggered.

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[1] *Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 42.

2. Defendant's Offer to Settle

(a) Form of Offer

Currently, if a plaintiff makes an offer to settle which the defendant decides to accept, the defendant must either pay into court the full amount specified, or consent to judgment. If the defendant wishes to encourage settlement on different terms, he may only pay into court. The impecunious defendant is therefore deprived of a procedure to cut short the action.

We think it is undesirable to force an impecunious defendant to trial when the plaintiff is unwilling to seriously and reasonably negotiate. That the defendant is unable to make a payment into court should not bar him from being able to propose a serious settlement which is subject to a costs sanction if refused. We have concluded that a defendant should also be able to make an offer to settle. If the plaintiff refuses to accept that offer and receives an amount equal to or less than it, he should be responsible for costs under Rule 37 as if the defendant had made a payment into court.

We realize that adopting this approach in the interests of impecunious defendants may encourage defendants to make offers to settle rather than pay into court. Payment into court is convenient for plaintiffs who are spared having to commence execution proceedings on the judgment they receive. We doubt, however, whether the plaintiffs' convenience outweighs the best interests of the administration of justice.

It could also be argued that a plaintiff might be willing to accept a payment into court that is less than he reasonably expects to receive at trial because he will be spared having to execute on the judgment, while he would be unwilling to accept an offer to settle for the same amount. As a result, if that is true, the defendant is able to hedge his bets. He may make an offer in terms he thinks the plaintiff is unlikely to accept, with some chance that he will still become entitled to costs at trial. It is undesirable to adopt a procedure which may punish the plaintiff for refusing a low offer, particularly when that procedure might not encourage pre-trial settlement.

While we suspect there is some merit to this argument, we do not think it weighs heavily against adopting a defendant's offer to settle. The prospect for abuse in this context is no greater than under the current practice governing offers to settle and payments into court. That risk does not outweigh the benefits that accrue from encouraging pre-trial settlement. Moreover, it is difficult to characterize this sort of practice as abuse. Machinery to encourage settlement is designed to place pressure on the parties to settle.

We have also concluded that a defendant should be able to make an offer to settle for both monetary and non-monetary relief. The arguments raised in favour of this approach with respect to the plaintiff's offer to settle apply equally here.

3. Methods for Comparing Success at Trial with the Terms of an Offer to Settle for Non-Monetary Relief

Currently, the success of a payment into court or of an offer to settle can be determined by an arithmetic comparison with the result at trial. An offer to settle for non-monetary relief cannot be tested with that sort of precision.

(a) Awarding Increased Costs only if Judgment Gives the Relief Specified in the Offer to Settle

Perhaps the easiest approach to apply would be to award increased costs only where the plaintiff is granted at trial the relief specified in the offer to settle. For example, A sues B for damages for breach of contract and for a

declaration that the contract has been repudiated (B's breach, A alleges, is a rejection of the contract and A has accepted that rejection. If the court finds that the contract has been repudiated, A is no longer bound by its terms). A, who really just wants out of the contract, makes an offer to settle that requests B to consent to judgment with respect to the repudiation. B, who does not think he is in breach of contract and wishes to keep A to his contract, refuses the offer. A receives judgment for $1,000 and a declaration that the contract was repudiated. A should be entitled to increased costs.

The defect in this approach is that the court may grant A relief which, while not identical to what he sought in the offer to settle, is equivalent in result. The court might, in the last example, find that the contract was void *ab initio* (that no contract ever existed between the parties). The result is the same for A. He is not bound by the contract. But, under this approach, he would not be entitled to increased costs. This approach is not very flexible.

Moreover, an offer to settle should encourage parties to compromise their disputes fairly. In practice, a plaintiff will often request less than he believes he will receive at trial merely to avoid delay and costs. For example, if B owes A $40,000, A might make an offer to settle for $35,000. An approach which rewards a plaintiff only if he makes an offer to settle for what he will receive at trial is unlikely to encourage him to suggest a reasonable compromise of his claim. For these reasons, we have rejected this approach.

(b) Where Judgment Includes the Relief Sought in the Offer to Settle

Another option is to provide that if a plaintiff makes an offer to settle in respect of a non-monetary claim, which is refused by the defendant, and the judgment granted the plaintiff includes that relief, he should be entitled to up to double costs. For example, if the plaintiff offers to settle for an injunction prohibiting boating after 6:00 p.m., and at trial is granted an injunction prohibiting boating after 4:00 p.m., the relief granted the plaintiff would include the relief which he was prepared to accept. If, however, he receives relief of a different nature, the costs sanction would not apply.

This approach has several advantages. First, it permits the plaintiff to bring some pressure on a defendant to consider a reasonable offer because if the defendant refuses it he risks increased liability for costs. Second, it encourages plaintiffs to frame their offers reasonably since they will not be entitled to increased costs if the judgment received does not include the relief specified in the offer to settle. Third, it does not discourage a plaintiff from suggesting a reasonable compromise of his claim.

(c) Reasonableness of the Offer

Another option is to grant the courts discretion to consider the reasonableness of the offer.

This approach has been adopted recently in the British Columbia Supreme Court Rules. Rule 60, which governs matrimonial proceedings, has been amended[2] to provide that a spouse may make an offer to settle for a claim for maintenance or property under the *Divorce Act* or the *Family Relations Act*.[3] If the offer is refused, the court may take into account its terms when exercising its discretion as to costs.[4] The court may award to the spouse who made the offer costs of the trial on the solicitor and client tariff, or it may award up to double costs for preparation, trial and proceedings after trial on the party

[2] B.C. Reg. 178/83, effective September 1, 1983.
[3] R. 60 (16).
[4] R. 60 (20).

and party tariff.[5] The new rules do not specifically direct the court on the exercise of this discretion. It is implicit that the court is to exercise this discretion based upon the reasonableness of the offer to settle.

This approach has also been recently adopted in Ontario. Under the Ontario Rules of Civil Procedure, a party may make an offer to settle. The offer is not limited to monetary relief.

If the offer is refused, the test for entitlement to increased costs is whether the judgment received is "as favourable, or more favourable, than the terms of the offer to settle."[6] In a previous draft[7] of the Ontario Rules, the test was formulated differently. If the offer was refused, the court was entitled to take into account the reasonableness of the offer in the making of any award as to interest or costs.[8]

In the Working Paper, we tentatively favoured an approach which would provide objective certainty to whether an offer to settle equalled or bettered an offeree's success at trial. We proposed that:

> 5. If a party does not accept an offer to settle made by an offeror who is
> (i) a plaintiff, and judgment includes the relief specified in the offer; or
> (ii) a defendant, and the relief granted in the judgment was included in the relief specified in the offer,
> the offeror should be entitled to increased costs.

This approach is admittedly complex but, nevertheless, received support from our correspondents as a workable, if difficult, solution to the problems raised.

Since publication of the Working Paper, Rules 60 (16) and (20), which govern costs in matrimonial proceedings, have been tested in practice, and do not appear to have presented the courts or litigants with significant problems. That suggests a simpler approach, based upon the reasonableness of the offer, might be adopted. That was urged in one submission:

> We think that a few simple rules would quickly develop. Indeed, any counsel ought to be able to anticipate what the courts would be likely to do. It is important that that should be so because the system will not be effective unless counsel can anticipate the effect of formal settlement negotiations.
>
> We think that the rules will not work fairly with respect to settlement negotiations unless there is left a wide discretion to the judges. If a wide discretion is to be left to the judges, then the complex set of rules would merely hamper that discretion but would not tend to make the exercise of the discretion more predictable.
>
> We understand that the reason why you prefer to have rules, even if somewhat complex, is so that the parties may anticipate the effect of the settlement negotiations on their claims for costs and on their liability for costs. But in most cases we feel that the effects of the settlement offers will tend to be self-evident and in the remaining cases, the difficult ones, perhaps it is better to use discretion than to have a set of rules that may work unfairness.
>
> The judges now have a very wide discretion with respect to costs. See, for example, *Landry* v. *Bridgestone Tire Co. Ltd.*, [1976] 3 W.W.R. 160 (B.C.S.C.) and *Oasis Hotel Ltd.* v. *Zurich Insurance Company*, (1981) 28 B.C.L.R. 230. We do not think that the discretion that we are proposing to deal with costs following formal settlement negotiations is any wider than the present jurisdiction with respect to costs, generally.

We find this submission convincing. The test for determining whether a costs sanction should attach to refusing a settlement offer for non-monetary relief should be the reasonableness of the offer with respect to the result at trial. When comparing different kinds of non-monetary relief, it should not be

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[5] *Ibid.*

[6] R. 49.10; this approach has also been adopted in New Brunswick: *see, e.g., Royal Bank of Canada* v. *Bouchard*, (1983) 21 A.C.W.S. (2d) 167 (N.B.Q.B.).

[7] Working Draft of the Proposed Ontario Rules of Civil Procedure (1978).

[8] R. 50 03 (2).

difficult to determine whether there is a significant difference between that specified in the offer to settle and in that granted at trial. Moreover, this approach simplifies the offer to settle procedure.

There may be sound reasons for a litigant to refuse an offer to settle and proceed to trial. If so, the costs sanction might not be justified even if the result at trial was no better than the terms of the offer to settle. We are reluctant to forbid the court from considering factors other than the result at trial, but we think that it is desirable to ensure that factors extraneous to the result at trial are only taken into consideration in defined circumstances, and then cautiously. The general rule should be that the offeror is entitled to increased costs when the offer to settle ought reasonably to have been accepted in light of the result at trial. Increased costs resulting from refusal of an offer to settle, however, should follow as a matter of course where the offeror is:

(a) a plaintiff and judgment includes the relief specified in the offer; or

(b) a defendant, and the relief granted in the judgment was included in the relief specified in the offer.

By taking this approach, we define circumstances where increased costs should follow automatically. A court might still find that an offer to settle which does not meet this criteria ought reasonably to have been accepted. In that case the court will be involved in a consideration of the significance of the disparity between the terms of the rejected settlement offer and the result at trial as well as other circumstances.

Example 5: P and D lived together in a common law relationship. P commences an action against D for maintenance and for a declaration of an equitable proprietary interest in the family home. P makes an offer to settle for a $20,000 lump sum payment for maintenance and for recognition of an equitable proprietary interest in the family home for half its value. D refuses the offer.

Variation 1: P receives judgment for a $30,000 lump sum payment for maintenance, but is not granted a declaration of an equitable proprietary interest. Since P was successful at trial, she will be entitled to her taxed costs on the maintenance issue. Under the current law, P should be entitled to increased costs at least for that portion of the litigation relating to the claim for maintenance.

Variation 2: P receives judgment for a $15,000 lump sum payment for maintenance and is granted a declaration of an equitable proprietary interest in the family home for half its value. Since P was successful at trial, she will be entitled to her taxed costs. Under the current law, P would not be entitled to increased costs. Under the approach we favour, P would be entitled to increased costs for that portion of the litigation relating to the claim for a declaration of an equitable proprietary interest.

Variation 3: P receives judgment for a $30,000 lump sum payment for maintenance, and a declaration that she holds an undivided half interest in the family home as a tenant-in-common. Under the current law, P would be entitled to increased costs for at least that portion of the litigation relating to the claim for maintenance. Under the approach we favour, it is open to the court to find that the result at trial (the declaration of a legal interest in the family home) validates P's offer to settle for a declaration of an equitable proprietary interest, and also order increased costs for the portion of the litigation relating to that claim.

Example 6: P commences an action against D for damages and for an injunction prohibiting boating on a lake. D makes an offer to settle for $30,000 and an injunction prohibiting boating on the lake after 6:00 p.m. P does not accept it.

Variation 1: P receives judgment for $40,000. The application for an injunction is refused. D should be entitled to costs for that portion of the litigation that related to the application for an injunction.

Variation 2: P receives judgment for $20,000 and an injunction prohibiting boating on the lake after 8:00 p.m. D should be entitled to his costs of the litigation from the date of the offer to settle.

We have also considered whether this approach should be extended to govern offers to settle for monetary relief. Currently, a difference of pennies can determine whether a refusal to accept an offer to settle will attract increased costs. Adopting a test of reasonableness may permit courts to require a more substantial difference between the relief specified in the offer to settle and that granted at trial before the courts will refuse to award increased costs. For example, currently the plaintiff may make an offer to settle for $100,000. If at trial he receives judgment for $99,999.99, he will not be entitled to receive increased costs. Was the defendant justified in refusing the offer and forcing the trial? Certainly, if the result at trial is the only criteria consulted, he was not.

While there is some merit in adopting this approach for offers to settle for monetary relief, we are concerned that it will present the courts with difficulties and create uncertainty. What difference in result should be regarded as substantial? A stronger case must be made out before the arithmetical precision of the current test governing offers to settle for monetary relief is abandoned.

4. Specific Aspects of a Settlement Offer Procedure

In the Working Paper, we made a series of proposals that followed from the tentative adoption of an objective approach to measuring success.[9] These proposals addressed specific aspects of a formal settlement offer procedure, and would aid in making the procedure certain. At the same time, however, they significantly added to its complexity. Upon reconsideration, we have concluded that these refinements need not be embodied in new rules. For the most part, the problems they address either do not arise under our recommendations, or are adequately dealt with by other features of our recommendations. We have accordingly declined to make similar formal recommendations in this Report.

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[9] These were:

1. (c) The offer to settle should clearly distinguish between the kinds of relief sought, although, other than as may be currently necessary, it need not break down a global damage award.

2. An offer to settle may be accepted in part, unless the offeror stipulates that the offer may only be accepted in its entirety.

3. An offer to settle may provide for the payment of interest, at a rate specified by prior agreement of the parties or calculated under the *Court Order Interest Act*.

6. If an offeror is successful only in part, the court may award increased costs for that part of the offer to settle, unless the offeror stipulated that the offer to settle could only be accepted in its entirety.

7. (a) Unless otherwise agreed, it should be presumed that the amount specified in an offer to settle does not include payments on account.

(b) Unless otherwise agreed, it should be presumed that payments on account are to be added to a defendant's payment into court.

(a) Part Success

It may happen that the plaintiff is granted only a portion of the relief he was prepared to accept in his offer to settle. It was our tentative conclusion in the Working Paper that the courts should have the discretion to order increased costs where the plaintiff is successful on part of his claim in the offer to settle. Under the current rules that sort of result is possible. For example, if the plaintiff has made an offer to settle for damages, which is refused, and succeeds at trial on that claim for relief, but fails with respect to other relief claimed which was not the subject of the offer to settle, it would appear that the courts have discretion to award up to double costs.[10] The courts may consider what portion of the litigation concerned the claim which was the subject of the offer to settle and award increased costs with respect to that portion. Reported cases do not indicate that any problems arise in this context.

Where there is divided success, the courts must often apportion costs. *Andrews* v. *Farrell Estates Ltd.*[11] is a recent example of the approach courts sometimes adopt in this regard. In that case, the plaintiff was unsuccessful on a significant issue. Meredith J. took the following approach in determining what portion of the costs the plaintiff should bear:[12]

> I decline the invitation to make a careful dissection of the time taken by the witnesses at trial. Rather I would say that had the point not been raised, the trial (if a trial were necessary) should have taken no more than four days—I will say five at the outside. In fact it took eight. In these circumstances, I hold the plaintiff entitled to 93 per cent (the percentage liability assessed against the defendants) of the costs of a five-day trial. The defendants will be entitled to their full costs against the plaintiff of the additional three days. All costs will be awarded on the same scale.

In the Working Paper, we also suggested that it should be open to a defendant to make a payment into court or otherwise to accept a compromise with respect to a part of the litigation. That would result in defining and limiting the issues which must be litigated. The saving in court time could be substantial. Currently it is open to a plaintiff to make an offer to settle with respect to part of his monetary claim. We tentatively concluded that this approach should be adopted with respect to both monetary and non-monetary claims.

Since under our recommendations any party to litigation can make an offer to settle, there is no need to provide for part acceptance, or offers that may only be accepted in their entirety. The same thing is accomplished if the offeree makes a formal counter offer to settle. Moreover, it is currently open to the courts to award increased costs when the offeror is only successful in part.

It would appear that, pursuant to the court's general discretion with respect to the award of costs,[13] the court may disallow costs to a successful party whose conduct is responsible for increasing the duration and costs of litigation, or it may increase an award of costs to a successful party when another party is responsible for unreasonably increasing the costs of the

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[10] *See, e.g., Shaw* v. *Grey*, (1968) 3 D.L.R. (3d) 158 (B.C.S.C.). The plaintiff claimed special damages and damages for loss of *consortium* and of *servitium*. The defendant made a payment into court. The plaintiff's judgment was less than the amount paid for special damages, but greater than the amount paid in for loss of *consortium* and of *servitium*. The defendant was entitled to costs on the issue of special damages. The plaintiff was entitled to costs on the issue of loss of *consortium* and of *servitium; cf. Cahoon* v. *Franks*, [1967] S.C.R. 455; *see also Moore International (Canada) Inc.* v. *Carter*, (1982) 41 B.C.L.R. 396 (B.C.S.C.), on payments into court.

[11] (1983) 46 B.C.L.R. 170 (B.C.S.C.).

[12] *Ibid.* at 171.

[13] R. 57 (5); *Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 63 (2).

litigation.[14] We think that failure to accept a reasonable offer made by a defendant with respect to part of a plaintiff's claim could, in some circumstances, justify the disallowance of costs, just as a defendant's refusal to accept part of a plaintiff's offer to settle should result in increased costs, but the cases indicate that this discretion is usually exercised only when costs are increased by the plaintiff's misconduct. The approach we have recommended grants the courts discretion to define more fully those circumstances when a costs sanction should apply. The result of permitting both parties to make formal settlement offers is to permit the courts to use costs as a sanction for unreasonably refusing to accept part of an offer to settle.

(b) Interest

A litigant should be able to make an offer to settle that is subject to the payment of interest at a fixed rate calculated from the date either of the cause of action arising or of the offer, to the time of its payment. Calculating interest accruing *per diem* is not an onerous arithmetic task and, if the amount of money in dispute is large, interest may be significant. If, for example, the plaintiff's claim is for three million dollars, interest at 12% accrues at the rate of about $1,000 a day. A plaintiff would be understandably reluctant to make an offer to settle for a fixed amount and forego interest accruing to the date the defendant elects to accept it.

In some cases, entitlement to interest may be the result of agreement of the parties and the rate of interest will be determined by that agreement. In most cases it will be convenient to make an offer to settle which specifies the sum the plaintiff will accept, without reference to accrued interest, subject to prejudgment interest from the date the cause of action arose to the date of payment. That approach more nearly corresponds to the result that might prevail at trial, ensures that the plaintiff does not have to forego interest and takes advantage of current mechanisms under the *Court Order Interest Act* for calculating interest on a claim at rates which are fair to all parties.

In the Working Paper we tentatively proposed that a party should be able to make an offer to settle that is subject to the payment of interest. Under the current rules governing settlement offers, that may not be done. The offer must be for a "sum." In *Hine* v. *Bentley*, discussed earlier, it was held that an amount that changes from day-to-day by the accrual of interest was not a "sum" within the meaning of Rule 57 (18).

Under the settlement offer procedure we recommend, an offer to settle is not confined to specific "sums" of money. There is nothing to prevent an offeror from making an offer to settle that is subject to the payment of interest. If a litigant is entitled to prejudgment interest, including such a claim in an offer to settle would be unobjectionable. Under the recommended approach, there is no bar to including a claim for interest in a settlement offer and, consequently, there is no need for a specific recommendation or rule to permit a claim for interest to be part of an offer to settle.

(c) Payments on Account

We observed that there is some confusion in the cases about how to handle payments made before judgment by one party to another. The usual

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[14] *Cameron* v. *Carse*, (1914) 20 D.L.R. 952 (B.C.S.C.); *Young Hong* v. *Macdonald*, (1911) 16 B.C.R. 133, 17 W.L.R. 417; *Winnipeg Mortgage Holdings Ltd.* v. *Allard*, (1980) 12 C.P.C. 222 (B.C.S.C.) *per* Meredith J.; *see also Concerned Citizens of B.C.* v. *Capital Region District*, [1980] B.C.D. Civ. 3579-06 (B.C.S.C.), *per* Bouck J., with respect to apportioning costs where success is divided; *March* v. *Westminster Medical Building Ltd.*, [1980] B.C.D. Civ. 3585-02 (Co. Ct.), *per* Hinds C.C.J.; *see also Mitchell* v. *Mitchell*, (1982) 42 B.C.L.R. 261 (B.C.S.C.); *Fraser* v. *Fraser*, [1983] 4 W.W.R. 767 (B.C.S.C.); *Young* v. *Harper*, [1983] B.C.D. Civ. 3576-06 (B.C.S.C.); *Bell Thompson Developments Ltd.* v. *Nam*, [1983] B.C.D. Civ. 3590-02 (B.C.S.C.).

case where this issue arises involves the pre-trial payment of no-fault benefits in personal injury cases. Where there is no specific provision, it would be useful to provide a rule to determine how such payments are taken into account. For example, the rules might provide that:

(a) the amount specified in the plaintiff's offer to settle does not include payments on account;

(b) payments on account are to be added to a defendant's payment into court, or offer to settle.

If this approach is adopted, then when the court must determine entitlement to costs under Rule 37 or Rule 57, payments on account having been excluded by provisions (a) and (b), it is only necessary for the court to compare the offer to settle by the plaintiff or defendant with the judgment granted after deduction of payments on account.

In the Working Paper we tentatively proposed that this approach be adopted. Upon reconsideration we have concluded that it is unnecessary to amend this aspect of the law. A party who makes a settlement offer can easily state whether the offer refers to all claims or is exclusive of payments on account. Moreover, the cases in which this issue has presented problems have served as a caution to the profession which is now aware of the need to address this issue in the settlement offer. There is no demonstrated need for an arbitrary rule to resolve these problems.

5. Acceptance of an Offer to Settle

Currently, a defendant can only accept an offer to settle by paying into court or consenting to judgment. There will be circumstances, however, where the defendant wishes to accept an offer to settle, but cannot meet its terms immediately. The defendant may be reluctant to consent to judgment since the plaintiff could immediately commence execution proceedings.

We have concluded that a defendant should be able to accept a plaintiff's offer to settle without paying into court or consenting to judgment. Obviously, acceptance of an offer does the plaintiff very little good unless the defendant complies with its terms. If the defendant, having accepted the offer, does not comply with its terms within a reasonable time, then the plaintiff should be able to make an application for judgment in the terms of the offer to settle.[15] The court should give judgment pursuant to the application if it is satisfied that the defendant has failed to meet the terms of the settlement within a reasonable time. A similar result should follow where a plaintiff accepts a defendant's offer to settle and its terms are not satisfied within a reasonable time.

What is a reasonable time is a question which will vary depending on the facts of each case. Usually the parties will agree upon a specific time in which the terms of the settlement must be satisfied. If they do not agree, the law should provide for a specific time. We have arbitrarily chosen a period of 30 days from acceptance in which the defendant must comply with the terms of the offer to settle. This refinement should encourage parties to negotiate and settle their disputes without litigation. If the defendant accepts an offer and then fails to abide by it, the plaintiff is unlikely to be prejudiced by having to wait 30 days or such other period as may be agreed upon, until entering judgment and commencing execution proceedings. If the plaintiff is apprehensive that the defendant may use that time to render himself judgment-proof, there are procedures available to preserve the defendant's assets, such

[15] R. 44 (1). Under Rule 44 of the Supreme Court Rules, where an application in a proceeding is authorized to be made to the court it shall be by way of interlocutory application in the form of a notice of motion. R. 44 (3).

as a Mareva injunction. Moreover, thirty days is not very long compared with the several years that often pass between a dispute arising and its resolution by judgment at trial.

6. Recommendations

The Commission recommends that:

1. *(a) A party to litigation should be able to make an offer to settle for monetary and non-monetary relief.*
   (b) "Monetary relief" in (a) includes debt.
2. *(a) If an offer to settle is accepted, but its terms are not met within the time agreed to by the parties, an application for judgment in the terms of the offer may be made.*
   (b) If the parties do not otherwise agree, the terms of the offer to settle must be met within 30 days of acceptance.
3. *(a) If a party does not accept an offer to settle for non-monetary relief which having regard to the result at trial ought reasonably to have been accepted, the offeror should be entitled to increased costs.*
   (b) An offer to settle for non-monetary relief is conclusively deemed to have been one which ought reasonably to have been accepted where it was made by
      (i) a plaintiff, and judgment includes the relief specified in the offer; or
      (ii) a defendant, and the relief granted in the judgment was included in the relief specified in the offer.
4. *If a party does not accept an offer to settle for monetary relief, the offeror should be entitled to increased costs where the offer was made by*
   (a) a plaintiff and judgment is for an amount equal to or greater than the amount specified in the offer; or
   (b) a defendant and judgment is less than or equal to the amount specified in the offer.

C. Entitlement to Costs

In the last chapter we observed several miscellaneous issues which have arisen when determining entitlement to costs, which have either not been addressed, or adequately resolved, by the courts.

1. Prejudgment Interest

To determine whether the plaintiff was entitled to increased costs, the courts compare the sum specified in the offer to settle with the amount of the trial judgment plus prejudgment interest calculated to the date of the judgment.[16] This approach may achieve unjust results. For example, the plaintiff may offer to settle for $100,000 in December, 1982. The defendant does not accept that offer. At trial, which takes place in December, 1983, the plaintiff receives judgment for $80,000 plus $20,000 prejudgment interest. If prejudgment interest is considered as part of the judgment for the purpose of determining whether the plaintiff's success is equal to or greater than the amount for which he offered to settle, the plaintiff will be entitled to double costs. However, a fairer approach to determine whether the offer to settle was

[16] *Lilis* v. *Whitepass Transportation Ltd.*, (1983) 43 B.C.L.R. 103 (B.C.C.A.); *see also Gem Structures Ltd.* v. *Orr*, (1983) 44 B.C.L.R. 18 (Co. Ct.).

reasonable is to consider only that portion of prejudgment interest that had accrued by the date the offer to settle was made. Otherwise the court is involved in comparing entirely dissimilar things. In the example, an entire year's interest on the judgment was necessary to bring its total to an amount equal to that specified in the offer to settle. Clearly, the offer was unreasonable at the time it was made.

It is our conclusion that the law requires amendment where the offer or payment in is silent on the question of interest. The courts should take into account prejudgment interest accruing to the date of the offer or payment in to determine whether refusal justifies increased costs.

If the payment into court or offer to settle specifies what portion of it represents interest, then the courts must determine whether the provision for interest was reasonable in respect of the result at trial on the litigant's entitlement to prejudgment interest, and no problem arises.

The Commission recommends that:

5. To determine whether increased costs should follow refusal of an offer to settle or payment into court that is silent on interest, the court should not take into account interest arising after the date of the offer to settle or payment into court.

> **Example 7:** P commences an action against D for damages. D pays into court pursuant to R. 37 (13) (a) the sum of $110,000. P does not accept it. P receives judgment for $100,000 plus $20,000 pre-judgment interest. Prejudgment interest to the date of payment in is $10,000. D would be entitled to costs.

2. Contributory Negligence

A plaintiff who is found to be contributorily negligent will have his judgment (and perhaps his costs) reduced by a percentage reflecting the degree of fault attributed to him. The policy underlying this approach is that a person is only entitled to compensation from another to the extent that person was responsible for the victim's injury. If the defendant was only partly to blame, he should have to pay only part of the compensation. That principle applies equally to entitlement to costs, although under the *Negligence Act* the court retains a discretion to award full costs.

The argument in favour of an award of full costs (increased pursuant to Rules 37 or 57) to a person who is contributorily negligent is that these rules are designed to encourage pre-trial settlement, and a party who refuses a reasonable offer vindicated by judgment at trial must accept responsibility for the costs of the trial.

As we observed earlier, the courts exercise a discretion with respect to the award of costs and will not reduce costs because of contributory negligence if the result would be unjust. Moreover, one factor the courts currently take into account in determining whether costs should be reduced because of contributory negligence is whether there was a formal offer to settle.[17] Our conclusion is that the courts do not require further guidance on the issue of awarding increased costs when the plaintiff has been contributorily negligent.

3. Defendant and Third Party

Different provisions apply depending on whether the issue of costs arises between plaintiff and defendant and between defendant and third party. We

[17] *See, e.g., Swanson* v. *B.C. Packers Ltd.*, [1984] B.C.D. Civ. 3576-03 (B.C.S.C.).

can see no reason for distinguishing between these two cases. The provisions in Rule 37 and Rule 57 should be revised so that the same principles that apply between plaintiff and defendant apply between defendant and third party, with respect to the making of an offer to settle or a payment into court and the determination of entitlement to costs. The rules governing payments out of court should not be altered. The requirement that a defendant must obtain leave to receive money paid into court by a third party protects the interests of the plaintiff.

The Commission recommends that:

6. Rules 37 and 57 be revised so that the rules governing offers to settle and payments into court between defendant and third party correspond to the rules governing plaintiff and defendant. The rules respecting payments out of court should not be revised.

A related issue involves offers to settle where multiple defendants or third parties are joined in the proceedings. That issue is discussed later in this chapter.

4. Interest on Funds in Court

There would appear to be no reason why all monies in court should not bear interest. The only conceivable objections to that approach are that the registries have not the ability to calculate interest on monies deposited for short periods of time, or that they are not in a position to reinvest money in order to earn interest on it. Neither objection is without solution. Presumably the Ministry of Finance has sufficient expertise to provide the registries with systems for determining interest entitlement. Deposit of monies in an interest bearing account is an obvious method of reinvesting monies paid into court.

Our concern in this Report is confined to questions arising from monies paid into court to induce settlement. We agree with the reasoning of McTaggart L.J.S.C. in *Evans* v. *Jenkins*[18] that if monies paid into court pursuant to Rule 37 do not bear interest, litigants will be less likely to adopt this practice. Our conclusion is that these monies should bear interest.[19] For reasons given earlier, we think this question is of little significance with respect to a payment into court pursuant to an offer to settle, since the money will usually be promptly paid out of court. If, however, such money remains in court for a period of time, it too should bear interest. That may occur, for example, where a defendant pays money into court with respect to only part of a claim. In that case, the money may remain in court until the trial on the remaining issues concludes.

Our correspondents agreed that money paid into court to facilitate settlement of litigation should earn interest.

The Commission recommends that:

7. Monies paid into court pursuant to Rule 37 or Rule 57 should be "funds" within the meaning of Rule 58.

Legislation implementing Recommendation 7 should only be introduced after consultation with the Ministry of Finance with respect to administrative questions that must be dealt with. The necessary administrative changes would probably best be implemented at the beginning of the fiscal year.

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[18] (1982) 36 B.C.L.R. 253 (B.C.S.C.).

[19] That is the current practice in England: *see* Practice Direction, [1983] 1 All E.R. 928.

5. Costs

(a) Actual Costs

Increased costs pursuant to Rules 37 and 57 are based upon the party and party tariff. If the amount in issue is $30,000 or less, they are subject to a maximum of $5100.

While costs are regarded as an "indemnity" for the successful litigant, the party and party scale seldom completely indemnifies the successful litigant. Increased costs go some way towards more fully compensating a successful litigant for his actual expenses. An argument frequently raised is that to award actual costs against an unsuccessful litigant will prevent the average person from pursuing a valid claim. The results of litigation are seldom certain, and awarding actual costs against an unsuccessful litigant makes the risk accepted that much more hazardous. The law would become the exclusive tool of the wealthy and the insured.[20] On the other hand, awarding only a portion of actual costs incurred may deter potential litigation by penalizing the successful.

Even if it is likely that actual costs would prevent meritorious actions, we think that argument does not apply where an offer to settle has been made and refused, and the offeror's success at trial is equal to or greater than the offer. The offeror has been put to the expense of needless litigation and should be fully indemnified for the costs arising from it.

A problem arising from providing a full indemnity for costs is determining what those costs are. For example, a lawyer, when preparing his account, may be reluctant to charge premium rates to a client whose continued business is desired. If another party is responsible for those costs, that concern does not arise. The unsuccessful party should not be required to indemnify the successful litigant for costs which would not otherwise have been charged against the lawyer's client. Another concern is that solicitor/client costs might be steep due to the lawyer or his client's inefficiency or negligence, or costs may have been incurred for services rendered which were irrelevant to the conduct of the action.

One solution is to permit the courts to award increased costs, based upon a party and party scale, subject to a multiplier. Currently, for example, a plaintiff may be awarded up to double costs for preparation for trial, trial,and proceedings after trial. Perhaps the courts should have discretion to order up to, for example, five times the party and party tariff. The flaw in this approach is that it might result in giving the successful litigant much more than his actual costs.

Another solution, recently adopted in matrimonial disputes, is to permit costs to be awarded on the solicitor and client scale. That tariff, however, may also result in an award of costs in an amount less than the actual costs incurred, and an order based on it may not fully indemnify the succesful litigant.

In current practice, there are instances where one litigant will pay the other litigant's actual legal costs. That is, for example, frequently the practice in matrimonial disputes and divorce proceedings. The breadwinner, usually the husband, agrees to pay all or a portion of the other spouse's taxed legal costs. Similarly, in foreclosure proceedings, the mortgagor is usually obliged to pay the mortgagee costs of the proceedings based upon the costs incurred by the mortgagee to his solicitors. That is the result of a common provision in

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[20] "Simplification of Taxation," (1983) 133 N.L.J. 567-8.

mortgages,[21] by which the mortgagor agrees to pay the mortgagee's actual costs incurred in proceedings involving the mortgage or to indemnify the mortgagee for those costs. There is some doubt, however, whether the mortgagee is entitled to actual costs or only costs calculated on the solicitor and client tariff.[22] In a number of recent foreclosure proceedings,[23] courts have ordered the mortgagor to indemnify the mortgagee for its legal costs, charges, fees and expenses incurred with respect to the mortgage. The mortgagee is required by the order to tax its solicitor's account before the Registrar. The order further provides that all parties of record, including the mortgagor, are entitled to be served with the appointment to tax, to appear at the taxation and to make whatever objections to the account seem appropriate. In this way, actual costs incurred are subject to an objective scrutiny and fairly determined. The result is a full indemnity of the mortgagee's legal costs and disbursements.

In *Project Developments Co. Ltd. S.A.* v. *K.M.K. Securities Ltd.*,[24] a recent English case, a litigant was granted a full indemnity for his legal costs. The plaintiff had been granted a Mareva injunction to prevent the defendant from removing its property from England. An intervener, a bank subject to the injunction, successfully applied for a variation of the injunction. It was held that, since a Mareva injunction was an extraordinary remedy, the plaintiff was required to reimburse innocent third parties who had been put to expense as a result of the injunction. The court ordered that the plaintiff indemnify the intervener for its actual costs. Those costs were to be taxed, and the intervener was required to establish that the costs had been reasonably incurred and were reasonable in amount.

We have concluded that a party who refuses an offer to settle or a payment into court which is vindicated at trial should be responsible for actual costs, to the extent that they are reasonable in amount and have been reasonably incurred. Those costs should be taxed before the Registrar.

This approach might operate unfairly if the parties' legal fees are on a contingency basis. Frequently a lawyer will act on behalf of a client, and his fees will be based on a percentage of his success. Such an agreement may result in fees of an amount similar to that which would have been arrived at if the client had been charged at an hourly basis. Often, however, it may result in fees significantly higher than that. As between the lawyer and his client, fees calculated on a contingency basis which are large are usually fair since the lawyer shares in the risk of the litigation. It is not so clear, however, that an unsuccessful party should have to indemnify a successful litigant for contingency fees. We have concluded that the bill of costs submitted to the registrar should be presented on an hourly basis, as if there were no other contract as to fees. The bill of costs, presented as a lump sum bill, should be subject to the usual rules of taxation. The Registrar would then consider the hours involved in the litigation, the amount, the success, and the responsibility carried by the lawyer, in determining whether the bill of costs is reasonable.

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[21] *See, e.g., C.M.H.C.* v. *Conaty*, (1967) 59 W.W.R. 11, 61 D.L.R. (2d) 97 (Alta. S.C.A.D.); *Fleck* v. *Whitehead*, [1924] 3 W.W.R. 470, 19 Sask. L.R. 64, [1924] 4 D.L.R. 797 (C.A.); *Pope* v. *Roberts*, (1979) 10 B.C.L.R. 50 (C.A.); *see also Zero Stores (Sask.) Ltd.* v. *K.A.H. Investments Ltd.*, (1983) 21 B.L.R. 193 (Alta. C.A.); *Juchacz* v. *Perras*, (1983) 21 A.C.W.S. (2d) 113 (Sask. Q.B.).

[22] *Ibid.*

[23] *See, e.g., Bank of Montreal* v. *Dunkley*, (1983) 46 B.C.L.R. 17 (B.C.S.C.); *Credit Foncier Trust Company* v. *Forrest et al.*, (Unreported B.C.S.C. decision), Prince George Reg. No. SC420/82, Nov. 26, 1982 These orders are known as "Dunkley Orders;" *see also Cardinal Investments Ltd.* v. *Zen*, (1984) 53 B.C.L.R. 349 (B.C.S.C.).

[24] [1982] 1 W.L.R. 1470 (Q.B.D.).

The Commission recommends that:

8. *(a) The court, under Rules 37 and 57, may order up to a full indemnity for actual costs incurred following the making of an offer to settle or a payment into court, subject to taxation. The litigant in whose favour the order is made must establish that the costs and disbursements were reasonably incurred and reasonable in amount.*

(b) The bill of costs should be presented as a lump sum bill subject to the usual rules of taxation as between a solicitor and his own client.

We understand that revision of the tariff of costs has been under consideration for some time now. That revision may involve a reconsideration of the policy underlying an award of costs. If the tariff of costs is revised to provide something which amounts to full indemnification of a litigant's actual costs, the sanction for refusing a formal offer to settle should be revised. In that case, return to a multiplier would probably be desirable.

(b) Notice to Admit

Currently, under the Supreme Court Rules, there is another procedure where a costs sanction is imposed on a party who needlessly increases another party's costs of the litigation. Rule 31 provides that a party may request by notice another party to admit the truth of a fact or the authenticity of a document specified in the notice. If the party who receives the notice unreasonably refuses to make the requested admission, the court may order the party to pay the costs of proving it. Rule 31 (6) provides as follows:

> (6) Where any party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty such additional costs, or deprive the party of such costs, as the court thinks just.

We have been unable to locate any reported cases on this rule. The absence of cases may be because the notice to admit procedure is not used very often. Another reason may be that Rule 31 (6) is too vague in its terms. When would it be appropriate to order further costs as a penalty? The difficulty of establishing what costs were incurred in proving the truth of a fact or the authenticity of a document may also make this procedure undesirable. The costs incurred may be insignificant. Lastly, because of the costs sanction, perhaps parties seldom unreasonably refuse to make the requested admissions.

One of our correspondents made the following observations concerning the absence of reported cases on Rule 31 (6):

> The provisions of Rule 31 are not particularly effective, I think for two reasons. (1) at the time of closing arguments there are more important things to discuss than costs of, say, proving the fact that the defendant was incorporated, and counsel simply forgets to raise the issue. By the time a reserved judgment is handed down it is often commercially unproductive to go back before the same judge to argue about it. (2) It is seldom possible to find a tariff item for the costs of proving the fact that should have been admitted. Disbursements can usually be identified. Rule 31 (6) provides that the Court can award "additional costs". But if the party who had to prove the fact unnecessarily is in any event the winner those costs disappear into the tariff. Presumably the court would then either have to give an additional fee for a particular tariff item or fix a lump sum fee or possibly give an additional percentage markup. At all events it is the court that must do this because it is not sufficient to award "the costs of proving fact X" because a registrar has no tariff with which to carry out the order.

Whatever the reason for the absence of cases on Rule 31 (6), we think there is merit in amending its cost sanction to correspond to the approach we have proposed for offers to settle. Similar policy issues are involved. One litigant has forced another litigant to needlessly incur costs in the conduct of litigation. In our opinion, if a notice to admit is issued, and the party receiving the notice unreasonably refuses to make the requested admission, he should be required to indemnify the issuer of the notice for the costs of proving the truth of the fact or the authenticity of the document.

The Commission recommends that:

9. Rule 31 (6) be amended to provide a costs sanction corresponding to Recommendation 8.

6. Encouraging Earlier Settlements

(a) When Should a Litigant be Able to Make an Offer to Settle?

Currently, both a plaintiff's offer to settle and a defendant's payment into court tend to be made toward the final stages of the litigation. Often the reason for delay is simply that not enough information is available to evaluate accurately the plaintiff's claim and the chances for success until shortly before trial. Sometimes the reason for delay is that the parties have not addressed the possibility of settling the matter until just before trial. These kinds of tactics may be characterized as brinksmanship or may result from sloppy or negligent practice. Often clients are unwilling to take steps to compromise an action at an early point in the lawsuit.

The value of encouraging earlier settlements lies chiefly in avoiding the costs of pre-trial procedures. Pleadings, interrogatories and discoveries can be time-consuming and costly. A procedure which encourages the parties to consider early settlement might be desirable. There is no reason why the current ability of a defendant to pay into court, and our recommendation that the defendant be able to make an offer to settle, cannot be used early on in the litigation, to pressure the plaintiff to consider settlement, before incurring further costs. A plaintiff's offer to settle, however, is limited. If his offer is refused and the plaintiff is successful at trial, he is only entitled to the costs of preparation for trial, trial and proceedings after trial. There is, consequently, no reason why a plaintiff should make an early offer to settle.

We mentioned earlier that limits are placed on a plaintiff's offer to settle to avoid unfairly penalizing people being sued. Often the plaintiff's claim is not disputed. The defendant is merely unable to pay it. In these circumstances, it may be unfair to increase automatically the defendant's liability for costs. On the other hand, if a plaintiff were entitled to increased costs for all matters following the making of an offer to settle, there would be good reason, where the merits of the plaintiff's claim could be accurately determined, to make an early offer to settle. That approach would provide additional incentive for parties to settle disputes without litigation.

Arguments against this approach are troubling. It may be maintained, for example, that it is unfair to the defendant who may know little about the plaintiff's case until after discovery. Often discoveries will not be completed until shortly before trial. Each litigant should have some opportunity to determine the strengths of the other's case. On the other hand, a defendant is currently able to make an early payment into court, before the plaintiff may be fully informed of the strength of the defendant's defences. Perhaps these

different rights do not amount to injustice since usually the plaintiff is better placed to know what is actually in dispute. The fact that early payments into court by defendants are not common suggests that is the case.

There are many cases, however, where the dispute between the parties is crystal clear. For example, A loans B $10,000. B does not repay it. A sues B. In that case there is no unfairness if A were able to make an offer to settle for $10,000. B's tactics may be to delay payment as long as possible. A costs sanction might make those tactics prohibitively expensive.

Perhaps one solution is to let the defendant later contest a plaintiff's entitlement to increased costs on the grounds that he could not accept an offer to settle until he was able to discover the plaintiff's case and evaluate its merits. That is an issue that the trial judge should usually be able to resolve without difficulty.

In the Working Paper, we identified three possible approaches, noting that each had defects:

(i) an offer might be made at any time;
(ii) an offer might be made at any time, subject to judicial determination that it could only be accepted at a later date, and costs should run from that time, or
(iii) an offer may not be made until after discoveries have been completed.

Most of our correspondents felt that it should be open to make an offer to settle at any time. This approach is most consistent with the goal of discouraging litigation. It ensures that a party who is prepared to settle litigation on reasonable terms is protected against legal costs incurred by the other party's failure to negotiate reasonably. The concern for unrepresented defendants in actions for debt is probably overstated. An offer to settle in such a case will increase the defendant's costs, but if the matter is concluded by the taking of default judgment, these costs should not be too substantial.

The court, however, should be able to consider special circumstances which dictated that the offer could only have been accepted at a later time, and award increased costs calculated from that later time.

The Commission recommends that:

10. (a) An offer to settle may be made at any time.

(b) The court may determine whether the offer could only reasonably be accepted at a date later than when the offer to settle was delivered, and order increased costs calculated from that later date.

(c) If notice of the offer to settle is delivered less than seven days prior to the commencement of trial, the costs of any steps taken by the parties subsequent to delivery shall be in the discretion of the court.

Recommendation 10 (c) is in accord with the current law governing payments into court. The offeree should have some time before trial to consider accepting an offer. The requirement for seven days notice encourages that result. Notice of an offer to settle delivered within seven days of the trial may still entitle the offeror to increased costs, but the court has a discretion to determine whether all or only some of the costs incurred after delivery of the notice should be increased.

7. Offers on Liability

(a) England

Currently a litigant may not make an offer to settle on the issue of liability subject to the possibility of increased costs. The Winn Committee[25] identified several problems with the current system of payments into court that arise because a plaintiff may not make an offer to settle on the issue of liability:

(a) An innocent plaintiff who will succeed against one of several defendants, all of whom contest liability, may reject a joint payment in and be faced with substantial costs of a lengthy trial concerned primarily with resolving the defendants' respective liabilities;

(b) A plaintiff may also become responsible for costs where quantum is not in issue:[26]

> But even a straightforward case may be hard on the plaintiff. The plaintiff and the defendants' legal advisers may agree informally that the case is worth £1,000 but the defendants press for 25 per cent contributory negligence. They pay in £760. The trial of liability takes four days. The trial of quantum lasts only 15 minutes, since the medical reports have been agreed and are read to the Court. The judge's award on quantum is distinctly on the low side at £750 but he finds full liability. On the issue on which most of the costs were incurred, the defendants were wrong and the plaintiff right. Yet the plaintiff pays the whole of the costs.

In effect, the current payment into court procedure may operate unfairly because a litigant may not make a formal offer to settle on the issue of liability. Even apart from that concern, however, there will be cases where the plaintiff must incur legal costs in settling the apportionment of liability among defendants where, from the plaintiff's perspective, it is irrelevant which among them is liable to him and in what degree. The Winn Committee recommended the adoption of a formal notice of offer procedure, that would deal with liability or quantum or both. It also recommended that the court award costs separately on the issues of liability and quantum.

This approach was criticized by the Cantley Committee[27] on the ground that one or the other party will be unable to properly assess liability or quantum and therefore will be penalized by the procedure. They concluded that the Winn Committee approach would only work if permitted after the completion of full discovery by both sides, in which case such a system would result in increased expense and delay. The Committee recommended that the defendant be able to make an offer to accept a specified portion of liability only if a "split trial" (in which the issue of liability is tried before that of damages) is ordered.

More recently, Justice, an English society interested in law reform, has endorsed the Winn Committee approach with several modifications. It has recommended a system of offer and counter offer in which a party can be required to explain the basis of calculation of his offer.[28] That approach ensures that a litigant has sufficient information to determine whether to accept an offer. Costs would be assessed by reference to the reasonableness of the parties in the circumstances.

Rule 31, discussed earlier, provides an analagous procedure for the admission of facts. Under that rule, a party may, by notice, request another party to admit, for the purposes of the proceeding only, the truth of a fact or the

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[25] *Report of the Committee on Personal Injuries Litigation*: Cmnd. 3691 (1968), at 144 *et seq.*

[26] *Ibid.* at 144.

[27] *Report of the Personal Injuries Litigation Procedure Working Party*: Cmnd. 7476 (1979).

[28] *Payment into Court*, Memorandum by a Sub-Committee on Civil Procedure, (Justice, 1981).

authenticity of a document.[29] The admission is deemed to be made by the party receiving the notice unless, within 14 days[30]

(a) it is specifically denied;
(b) detailed reasons are given why the admission cannot be made;
(c) the matter is privileged, irrelevant or improper.

A party who unreasonably refuses to admit the truth of a fact or the authenticity of a document may be ordered to pay the costs of proving it, or deprived of costs, as the court thinks just.[31]

(b) Notice to Admit Liability

A similar procedure could be devised to permit litigants to request an admission of liability. For example, in an automobile personal injury action the plaintiff could, by notice, request the defendant to admit 100% liability. If the defendant refuses to make that admission, the plaintiff would become entitled to increased costs if successful on that issue at trial.

Like the notice to admit facts, a notice to admit liability would require a reply from the defendant. Failure to reply, subject to the court's subsequent order, would constitute an admission of liability. A denial of liability would leave the defendant open to the risk of increased costs. On the other hand, this procedure would also be available to the defendant. Suppose he thinks the plaintiff is contributorily negligent. He could deliver a notice to admit liability to the plaintiff.

The problems observed by the Cantley committee are answered in large measure by permitting the recipient of the notice to explain why he cannot make the admission of liability. Perhaps he is unable to judge liability until he has further information. If the person giving the notice is successful at trial on the issue of liability, the trial judge would then consider whether the person who received the notice was unable to accept or deny liability. The trial judge should be able to order that increased costs run, not from the date of the notice to admit liability, but from when the person who received the notice was in a position to accept or deny liability. A full explanation may permit the person giving notice to provide further information which will allow the parties to reach a settlement. In order to encourage a full explanation of the reasons why liability cannot be admitted, the court should not be able to hear further submissions from the person receiving the notice when the question of costs arises except, perhaps, to comment on the explanation itself.

(c) Notice Accepting Liability

If there are several defendants involved in the action, separate notices to litigants might prove to be unwieldy. For example, a plaintiff, P, brings an action against A, B, C and D. P may issue separate notices to admit liability. Each of the defendants may issue notices to admit liability in differing portions. This approach might well confuse the litigation rather than encourage its settlement.

A simpler approach is to permit a litigant to issue a notice that stipulates the portion of liability the litigant is prepared to accept. If the issue of liability is settled on these terms, then only the question of an appropriate remedy remains. Even if that question must be resolved at trial, nevertheless the proceedings will be simplified and shortened. If liability is not settled, a litigant who has issued a notice stipulating the portion of liability he was

[29] R. 31 (1).
[30] R. 31 (2).
[31] R. 31 (6).

prepared to accept should be entitled to increased costs for that portion of the litigation dealing with liability where the result at trial on that issue is resolved as or more favourably to the litigant than provided in the notice. An identical approach would work between defendant and third party.

> **Example 8:** P brings an action against D for damages arising from a motor vehicle collision. P gives D notice that P is prepared to accept 40% of the liability for the accident. D is unprepared to accept the balance of liability. D gives P notice that D is prepared to accept 50% of the liability for the accident. P is unprepared to accept that apportionment of liability.

> **Variation 1:** At trial, D is found to be 80% and P 20% liable for the collision. P should be entitled to increased costs for that portion of the litigation dealing with liability.
>
> **Variation 2:** At trial, D is found to be 40% and P 60% liable for the collision. D should be entitled to increased costs for that portion of the litigation dealing with liability.

This approach should work well even when multiple defendants are involved in the litigation provided the defendants are severally liable. If the defendants are jointly liable, different problems arise. If defendants are jointly liable, then each defendant is responsible for the full amount of damages. The plaintiff may pursue his remedies against any defendant or any combination of them. Consequently, joint defendants must act in concert for this approach to work. The plaintiff might issue a notice accepting 10% of the liability. If the joint defendants accept that notice, then all that remains to resolve the issue of liability is the apportionment of fault among the defendants. The plaintiff need not take part in that portion of the proceedings. If the notice is refused but vindicated by the result at trial, the plaintiff should be entitled to increased costs for that portion of the proceedings.

(d) Offers Among Co-Defendants

An issue which does not involve the plaintiff, but concerns only defendants who share joint liability, is how to apportion that liability among them. One of the defendants may, for example, satisfy the plaintiff's claim. That defendant will frequently be entitled to contribution from others who share liability with him, according to the degree their fault contributed to the plaintiff's loss. In our opinion, a person who is jointly liable with others should be able to issue a notice to them that stipulates the portion of liability he believes the joint defendants should accept as regards the plaintiff, as well as what degree of fault he is prepared to accept with respect to rights of contribution among the defendants. If the notice does not result in settlement of either issue, the person who issues the notice should be able to look to his co-defendants for increased costs for the portion of litigation dealing with liability or apportionment of fault if at trial it is found that his estimation of joint liability or apportionment of fault is equal to or less than that which he was prepared to accept.

(e) Consequences of a Refusal of a Notice Accepting Liability

Increased costs following refusal of a notice accepting liability vindicated by the result at trial should be calculated in the same manner as increased

costs following refusal of a settlement offer justified by the result at trial. It should be open to a litigant to deliver notice accepting a portion of liability at any time, and costs should be calculated from the date of service of the notice. The court should have discretion to determine whether further time was needed to determine whether the stipulated portion of liability was reasonable, and calculate increased costs from another date. A notice issued by one defendant to defendants with whom he shares liability would be subject to a similar costs sanction. The difference in that case is that the defendants' liability for costs with respect to the plaintiff would be unaffected by such a notice. The sanction would involve new rights of contribution and indemnity among co-defendants.

Example 9: P brings an action against D1 (the driver of a motor vehicle) and D2 (the owner of a motor vehicle) for damages arising from a motor vehicle collision.

Variation 1: D1 and D2 jointly issue a notice accepting 90% of liability for the damages. P does not accept that apportionment. At trial it is found that D1 and D2 are only 80% liable. D1 and D2 would be entitled to increased costs for that portion of litigation relating to liability.

Variation 2: D1 and D2 cannot agree on the degree of their joint liability. D2 gives D1 notice that D2 is prepared to accept with D1 90% of the liability for damages caused the plaintiff. Whatever the finding on liability, D2's notice also provides that he is prepared to accept 0% of the fault causing the damages. (D2 asserts a right of contribution from D1 for 100% of their joint liability. This is contested by D1 who asserts that the vehicle was improperly maintained, leading to the accident.) At trial, it is found that the defendants share 80% of the liability for the accident. It is also held that D2 is entitled to contribution from D1 for 100% of damages paid by D2 to the plaintiff. Under the approach we are discussing, D2 should be entitled to increased costs from D1 for that portion of the litigation relating to apportionment of fault and contribution between the defendants.

Variation 3: The facts are the same as in Variation 2, except that at trial the defendants are found to be 90% jointly liable for the damages caused the plaintiff and that as between D1 and D2 for the purposes of contribution the degrees of fault are apportioned 90% to D1, 10% to D2. Under the approach we are discussing, D2 would still be responsible to P for costs of the proceedings, but he would be entitled to contribution from D1 for costs paid to P as well as for his own costs for that portion of the litigation relating to liability (but not for apportionment of fault between D2 and D1).

In the procedure described above, it is contemplated that the person giving notice will accept a portion of liability. The person giving the notice should not be prejudiced by indicating what portion of liability he will accept. It should not constitute an admission if settlement does not ensue.

(f) Recommendation

The Commission recommends that:

11. A rule be added to the Supreme Court Rules providing that:

(1) (a) A litigant may give a notice to an adverse party accepting a portion of liability.

(b) "Litigant" means any party capable of making an offer to settle.

(c) Joint litigants may only

(i) issue a notice to an adverse party accepting liability, or

(ii) accept a notice from an adverse party

jointly.

(d) A litigant who, it is alleged, is jointly liable with other parties may give a notice to those parties accepting

(i) a portion of liability to an adverse party, or

(ii) for the purposes of contribution, a portion of fault for joint liability, or

(iii) both a portion of liability to an adverse party and a portion of fault for joint liability.

(2) If a notice delivered in accordance with (1) does not result in settlement of the issue of liability or degree of fault, and the party who gives the notice is successful on that issue, he should be entitled to increased costs from the adverse party or contribution and increased costs from parties who share liability with him, as the case may be, for that portion of the proceedings.

(3) The court may order increased costs from the date of the notice or such other time as may be reasonable in the circumstances.

(4) A litigant who gives a notice accepting a portion of liability or of fault is not bound by that notice unless the recipient of the notice accepts settlement of the issue according to the portion of liability or of fault stipulated in the notice.

(5) "Costs" means

(i) contribution for costs payable to a litigant adverse in interest, or

(ii) in accordance with Recommendation 8.

(6) A notice accepting liability or a portion of fault may be withdrawn

(i) before acceptance by its recipient; or

(ii) after acceptance by its recipient with leave of the court.

Some objections may be raised to this recommendation. First, a point which has concerned the Commission is whether litigants will, as a matter of course, issue notices accepting 0% of liability in straightforward actions, automatically making the opposing party or parties subject to a penalty in increased costs without facilitating settlement. Our conclusion is that, if the issue of liability is straightforward, that matter should not be in dispute. If a litigant wishes to contest liability, he must pay for that privilege where he is incorrect. Even if the notice is for 0% liability, that should bring pressure on adverse parties to settle, and that result is desirable.

Further concerns may be raised. Complex situations may arise where the courts are left in doubt as to how the new rule is intended to operate. For example, after notices are issued, perhaps even after a portion of the dispute has been settled, further parties may be added to the litigation. Problems of this nature are resolved in part by permitting a party to withdraw a notice before acceptance, or after acceptance, withdraw a notice with leave of the court. It is virtually impossible to draft a rule that will cover every variation that might arise. It should be remembered, however, that costs (including increased costs) is in the discretion of the court. Whatever variations or complexities that may arise, the courts should be able to resolve them, guided by the principle underlying the recommended rule: a party who issues a notice to accept a portion of liability that is vindicated at trial should be compensated for costs needlessly incurred by pursuing that issue at trial. A party who is

unprepared to settle according to the terms a notice accepting a portion of liability vindicated at trial should compensate the litigant, who issued the notice, for costs needlessly incurred.

A. List of Recommendations

1. *(a) A party to litigation should be able to make an offer to settle for monetary and non-monetary relief.*
   (b) "Monetary relief" in (a) includes debt. (Page 31)
2. *(a) If an offer to settle is accepted, but its terms are not met within the time agreed to by the parties, an application for judgment in the terms of the offer may be made.*
   (b) If the parties do not otherwise agree, the terms of the offer to settle must be met within 30 days of acceptance. (Page 31)
3. *(a) If a party does not accept an offer to settle for non-monetary relief which having regard to the result at trial ought reasonably to have been accepted, the offeror should be entitled to increased costs.*
   (b) An offer to settle for non-monetary relief is conclusively deemed to have been one which ought reasonably to have been accepted where it was made by
      (i) a plaintiff, and judgment includes the relief specified in the offer; or
      (ii) a defendant, and the relief granted in the judgment was included in the relief specified in the offer. (Page 31)

4. *If a party does not accept an offer to settle for monetary relief, the offeror should be entitled to increased costs where the offer was made by*
   (a) a plaintiff and judgment is for an amount equal to or greater than the amount specified in the offer;
   (b) a defendant and judgment is less than or equal to the amount specified in the offer. (Page 31)

5. *To determine whether increased costs should follow refusal of an offer to settle or payment into court that is silent on interest, the court should not take into account interest arising after the date of the offer to settle or payment into court. (Page 32)*

6. *Rules 37 and 57 be revised so that the rules governing offers to settle and payments into court between defendant and third party correspond to the rules governing plaintiff and defendant. The rules respecting payments out of court should not be revised. (Page 33)*

7. *Monies paid into court pursuant to Rule 37 or Rule 57 should be "funds" within the meaning of Rule 58 (Page 33)*

8. *(a) The court, under Rules 37 and 57, may order up to a full indemnity for actual costs incurred following the making of an offer to settle or a payment into court, subject to taxation. The litigant in whose favour the order is made must establish that the costs and disbursements were reasonably incurred and reasonable in amount.*
   (b) The bill of costs should be presented as a lump sum bill subject to the usual rules of taxation as between a solicitor and his own client. (Page 36)

9. *Rule 31 (6) be amended to provide a costs sanction corresponding to Recommendation 8. (Page 37)*

10. *(a) An offer to settle may be made at any time.*

(b) The court may determine whether the offer could only reasonably be accepted at a date later than when the offer to settle was delivered, and order increased costs calculated from that later date.

(c) If notice of the offer to settle is delivered less than seven days prior to the commencement of trial, the costs of any steps taken by the parties subsequent to delivery shall be in the discretion of the court. (Page 38)

11. A rule be added to the Supreme Court Rules providing that:

(1) (a) A litigant may give a notice to an adverse party accepting a portion of liability.

(b) "Litigant" means any party capable of making an offer to settle.

(c) Joint litigants may only

(i) issue a notice to an adverse party accepting liability, or

(ii) accept a notice from an adverse party

jointly.

(d) A litigant who, it is alleged, is jointly liable with other parties may give a notice to those parties accepting

(i) a portion of liability to an adverse party, or

(ii) for the purposes of contribution, a portion of fault for joint liability, or

(iii) both a portion of liability to an adverse party and a portion of fault for joint liability.

(2) If a notice delivered in accordance with (1) does not result in settlement of the issue of liability or degree of fault, and the party who gives the notice is successful on that issue, he should be entitled to increased costs from the adverse party or contribution and increased costs from parties who share liability with him, as the case may be, for that portion of the proceedings.

(3) The court may order increased costs from the date of the notice or such other time as may be reasonable in the circumstances.

(4) A litigant who gives a notice accepting a portion of liability or of fault is not bound by that notice unless the recipient of the notice accepts settlement of the issue according to the portion of liability or of fault stipulated in the notice.

(5) "Costs" means

(i) contribution for costs payable to a litigant adverse in interest, or

(ii) in accordance with Recommendation 8.

(6) A notice accepting liability or a portion of fault may be withdrawn

(i) before acceptance by its recipient; or

(ii) after acceptance by its recipient with leave of the court. (Pages 42-43)

B. Acknowledgments

We wish to express our appreciation to all who took the time to consider the Working Paper and offered us their comments and suggestions. The submissions we received were thorough, thoughtful and of great assistance.

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Finally, we wish to express our gratitude to Thomas G. Anderson, Counsel to the Commission. Mr. Anderson, subject to direction from the Commission, drafted both the Working Paper and this Report.

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